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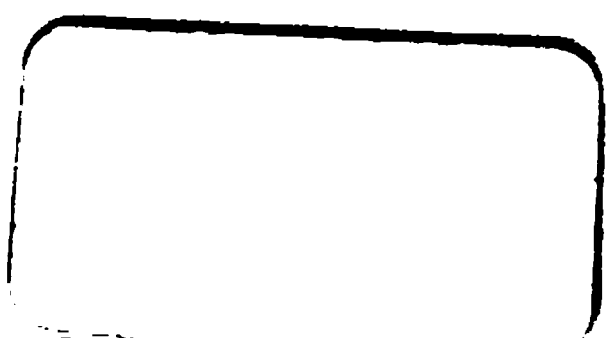
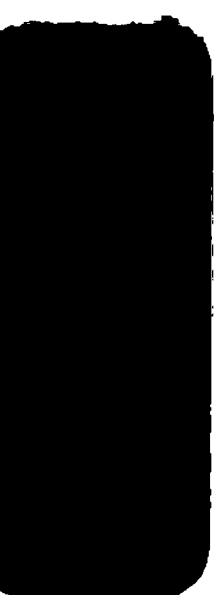
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A TREATISE
ON THE
LAW OF INTERCORPORATE RELATIONS

A
TREATISE ON THE LAW
OF
INTERCORPORATE RELATIONS.

BY
WALTER CHADWICK NOYES,
A JUDGE OF THE COURT OF COMMON PLEAS IN CONNECTICUT.

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DEDICATED
TO THE
HONORABLE AUGUSTUS BRANDEGEE,
AS A TRIBUTE TO A LEARNED LAWYER.

P R E F A C E.

THE modern business tendency is toward concentration and co-operation instead of competition. The modern business instrument is the corporation. The development of the tendency through the instrument has resulted in the joining together, in varying forms, of corporate entities and properties. Corporate conjunction involves intercorporate relations, and the legal questions growing out of these relations furnish the subject-matter of this treatise.

The preparation of the first four parts of this work has been a process of amplification; of the last part, a process of reduction. The conjunction of corporate entities through consolidation, of corporate properties through sales and leases, and the concentration of corporate control through holding shares, are outlined in general treatises upon corporation and railroad law. The material for the development of the subjects, in a manner commensurate with their importance, has, however, only been found through a systematic examination of original sources.

The law governing combinations of corporations is more accessible, but less adaptable. The value of a mass of apparently conflicting decisions appears only when it is reduced to principles. In collecting the cases much assistance has been derived from the general treatises upon monopolies and similar subjects. Especial acknowledgment is due to Mr. Eddy's valuable work upon combinations of labor and capital ("Combinations"), although its underlying theory that a combination of capital, to be unlawful, must be a conspiracy, is the opposite of that of the present treatise. The theory of this treatise is that the validity of a combination depends

upon considerations of public policy. Rules of public policy are formulated, and an attempt is made to deduce from the cases collected principles of general application. No consideration is, however, given to labor combinations and other subjects examined in the general treatises.

The statutes of all the American States and many English statutes, governing the various relations of corporations, are collected in footnotes; and the cases, where numerous, are arranged under the names of the respective States. By this plan, it is believed that the statute and case law of each State may be readily found.

With hardly a single exception, each citation has been carefully verified with the original report, the date of the opinion inserted, and parallel references added.

A treatise of this nature, prepared amid the distractions incident to the performance of other duties, cannot be free from fault. But while the conclusions may not always follow from the premises, and the theories may have no foundation at all, it is hoped that the work will be found accurate in stating and referring to the decisions of the courts. And whatever measure of accuracy it may possess is due, in no inconsiderable degree, to the diligence of Mr. Frank L. McGuire, of the New London (Conn.) bar, who has verified the references and prepared the Table of Cases.

W. C. N.

LYME, CONNECTICUT,

September 1, 1902.

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INTERCORPORATE RELATIONS.

INTERCORPORATE RELATIONS.

PRELIMINARY.

§ 1. A corporation is an artificial person, created by law, having, within the limits of its chartered powers, the rights of a natural person in the transaction of business. It is governed by the general rules of law relating to rights of property, contracts and torts which apply to individuals. Its relations with other corporations, as *persons*, are essentially the same as the relations of natural persons.

A corporation is something other than a person. It possesses the property of immortality — the capacity of perpetual succession — and may act with certainty in reference to the future. Its possibilities of material development, through the increase and disposition of shares, may be as unlimited as its duration. Its methods of control and management are regulated by rules applicable to it alone. While the relations of corporations with each other as persons are like those of individuals, the relations of corporations as *corporations* are essentially different. The welding of several corporations into one, the selling and leasing of corporate franchises, the acquiring of controlling stock interests, the combining of corporate properties — all are governed by principles of law either inapplicable or applying in different degree to the relations of individuals.

Intercorporate relations of this character grow out of a variety of processes which may be classified as follows:

I. The union of stockholders, properties and franchises of several corporations in a single corporation — *consolidation*.

II. The absolute transfer of the franchises and property of one corporation to another — *sale*.

III. The transfer for stated payments of the franchises and property of one corporation to another in perpetuity or for a term of years — *lease*.

IV. The acquisition by one corporation of shares of the capital stock of another — *corporate stockholding or control*.

V. The co-operation of several corporations to accomplish a given purpose — *combination*.

§ 2. The consolidation of corporations is chiefly exemplified by railroad companies and, to a far less degree, by other *quasi*-public corporations, where the transmission of the franchise is of essential importance, and where the statutory method of effecting such transfer must be strictly followed.

The consolidation of railroad companies, occasioned by their peculiar nature and use, has been taking place for a long time. In their early days, the extraordinary powers granted to them — the right to condemn lands, take tolls, and exclude all other cars from their tracks¹ — and their constantly developing necessity to the life of the people, led the legislatures to jealously guard the granting of authority to transfer the powers so intrusted. But it soon became apparent that the uniting of short connecting roads into through lines brought about increased facilities for travel and lower rates, and authority to consolidate came to be granted by special laws in particular cases. Special acts were followed by general laws until, at the present time, the public policy of nearly all the States, as indicated by their statutory provisions, is in favor of the consolidation of connecting railroads which are neither competing nor parallel. Under this policy railroad consolidations have taken place in constantly increasing numbers. The greater companies have absorbed the smaller roads; the local roads have been united into the through line; the through line has become a part of the railway system. This process of absorption is continually going on.

¹ In *Lake Superior, etc. R. Co. v. United States*, 93 U. S. 442 (1876), Mr. Justice Bradley notices the somewhat curious fact that in the earliest English railway acts, and in some of the first charters granted in this country, railroads were regarded as public highways upon which all persons could run their vehicles upon the payment of tolls. This theory was, however, abandoned at an early day.

The great railway system of to-day becomes but a unit in a greater system to-morrow. The semi-transcontinental line of the present will form a part of the line from ocean to ocean of the future. That all the railroads of the United States may be consolidated into four or five mammoth systems is more than a mere possibility.

§ 3. The relation of vendor and vendee between corporations as continually arising in the transaction of business, is, manifestly, governed by general legal principles applicable both to individuals and corporations. But while an individual, without restraint, may sell and dispose of all his property, the right to sell all its assets and render itself incapable of performing the functions for which it was created, exists in a *quasi*-public corporation only when expressly conferred by legislative authority, and may be exercised by a strictly private corporation only by the unanimous consent of its stockholders or as a means of liquidation.

The sale of corporate property for stock in the purchasing corporation—a familiar process in modern industrial enterprises—involves not only the power of the vendor corporation to take the stock, but the right of its minority stockholders to object to the embarkation of corporate assets in new adventures.

The sale of corporate franchises, especially those of railroad companies, has been illustrated most frequently by judicial sales under mortgage foreclosures, but as such sales involve the relations between a corporation and its *creditors* rather than intercorporate relations, they fall outside the scope of this treatise.

Private sales of railroads have, however, not been uncommon, and general statutes exist in many States authorizing the purchase by one railroad company of the road and franchises of another forming a connecting or continuous line with its own. The result to the public from such a sale and purchase in the increase of facilities for travel is the same as that following a consolidation.

§ 4. A lease executed by one corporation to another, of a portion of its property, incidental to the transaction of the

business for which it was organized, creates the relation of landlord and tenant between them and is governed by the general principles of law applicable to that relation. A lease by a prosperous corporation, however, of its entire property constitutes such a departure from the purposes for which it was incorporated that it requires the unanimous consent of its stockholders; and such a lease by a failing corporation can only be justified when it appears to be the best method of realizing upon the corporate assets. Principles of corporation law relating to the powers of corporations and the rights of minority stockholders may determine the validity of such leases.

The practical results of a consolidation of railroads, the increase in facilities for travel, the lowering of rates, the establishment of the through line or transcontinental system — all the results apparent from a point of view outside the corporation — may be as well obtained by a lease of corporate franchises and property for an extended period, whereby the affairs of the lessor and lessee corporations are placed under one management, as by a strict consolidation according to the provisions of a consolidation statute. The result from a point of view inside the corporation, and the relations of the corporations, are, however, essentially different. In the case of a consolidation the two companies become, as it were, partners in a new enterprise. In the case of a lease their relations are contractual and their interests as lessor and lessee are, to an extent, antagonistic.

In determining the rights of lessor and lessee under a lease of railroad property and franchises, in the usual form, the general principles of law governing the relations of landlord and tenant have little applicability. Such leases can only be executed by the sanction of the legislature. In them provisions thought essential in ordinary leases are often omitted. A lease for the usual term — nine hundred and ninety-nine years — is equivalent to a grant of the fee. "It would carry us to a time as remote in the future as the time of Alfred the Great is distant in the past."¹

¹ Van Syckel, J., in *Black v. Delaware, etc. Canal Co.*, 24 N. J. Eq. 465 (1873).

§ 5. Upon the principle that a corporation may not apply its funds to objects other than those defined by its charter, it is a general rule of law that one corporation, in the absence of express statutory authority, cannot hold stock in another corporation. Such authority, however, may often be found in special charters, and appears in the general laws of the States where most of the great corporations are organized, and, under such laws, corporations have been organized for the special purpose of holding stock in other corporations.

Corporations of this nature are denominated "holding corporations," and present the latest phase of corporate development. By means of one of these corporations, the practical consolidation of competing railroads has been attempted notwithstanding constitutional inhibitions against consolidation. By means of another, the greatest industrial combination in the world has been effected.

Where several corporations hold stock in another corporation, or where they are mutually interested in each other's shares, a "community of interest" may be said to exist. Where one corporation purchases a majority of the stock of another company, it acquires control. The control so acquired is not consolidation. Theoretically each corporation continues a separate and distinct existence. Practically, they act together for a common purpose, and the minority stockholders in the controlled corporation too often have occasion to demand that its affairs be managed in the interests of its stockholders and not in the interest of another company.

The peculiar value of the holding corporation to the financier is that by means thereof he obtains the maximum of control at the minimum of expense. By controlling one corporation which holds control of another he may obtain practical control of the latter at little more than half the cost of direct control.

§ 6. The union of corporate properties, as distinguished from the union of shareholders and franchises, is chiefly exemplified in the case of industrial corporations. In exceptional instances consolidation, according to statutory provisions, has been effected by such corporations. Generally,

as they rarely have franchises to be preserved, the uniting of corporate properties only has been attempted. The present method of accomplishing such result has come about through a process of evolution. At first, a simple association, without community of financial interest, was formed by corporations in the same line of business for the purpose of maintaining prices or limiting production. These associations were, as a rule, held by the courts to be unlawful combinations tending to create monopolies. To meet these objections "trusts" were created, whereby a union of interests was effected by the depositing of stock of several corporations in the hands of a trustee for a common purpose. "Trusts" in their turn were held to be unlawful combinations, as well as repugnant to elementary principles of corporation law, and finally the present method was evolved of forming a purchasing or holding corporation to acquire the property or stock of the several corporations.

The association of industrial corporations, by whatever means accomplished, has been induced by the constantly increasing tendency in modern business life toward a unification of interests and concentration of control. This tendency, while of somewhat recent inception, has been developed with phenomenal and startling activity in America since the conclusion of the Spanish war. Manufacturing and mercantile corporations of great magnitude, throughout the United States, have been united into greater companies covering wider fields, and these, in turn, have been combined into vast aggregations of capital controlling whole branches of industry.

The principles of law governing combinations of corporations are similar to those controlling combinations of individuals. In the test of threatened injury to the public, however, the danger of a combination may lie in its corporate character. The real menace of the huge corporate combination lies in its enormous collateral and inherent power—for evil or good—which no individual or combination of individuals, as such, could ever possess. That many combinations have not worked injuriously to the interests of the public is unquestionably true; that many others, from an economic

standpoint, are essentially vicious, cannot be denied. Their regulation, control, or suppression presents a serious problem, legal as well as economic.

In the absence of a controlling statute the validity of a combination is determined by rules of public policy. The rule that combinations for the elimination of competition are against public policy and, therefore, unlawful, is uniformly stated, but not uniformly applied. Upon similar facts, courts of different States have reached dissimilar conclusions, although applying the same stated principles. The public policy of a State as indicated by its legislative enactments is generally reflected in the decisions of its courts. While the State may not expressly define its policy, that which it fosters and derives its revenue from has seldom been declared unlawful.

Federal control over combinations must be confined to those which affect interstate or foreign commerce. The power of Congress in the matter is derived from the "commerce clause" of the Constitution, and the Supreme Court of the United States has held that such power does not extend to manufacturing corporations because manufacture is not commerce. No application of the "general welfare clause" of the Constitution could justify an act of Congress relating to the control of such combinations which would not equally justify federal regulation of divorces and other matters distinctively within the power of the State. Congress may, however, regulate everything directly connected with the sale and transportation of goods from one State to another, and the Sherman law is an effective instrument for the suppression of combinations contravening its provisions.

The legislatures of the States must afford the remedy for the evils arising from combinations of corporations not engaged in interstate commerce. They may control by positive enactments domestic corporations; by inhibitions, those of other States. The contention that under the Fourteenth Amendment the State is powerless to prevent the control of domestic corporations passing, directly or indirectly, into the hands of foreign corporations is not well founded. It ignores

the vital fact that a corporation is a creature of the State. The State may treat the acts of the stockholders as the acts of the corporation and may forbid the transfer of shares for the purpose of forming an unlawful combination within or without its borders. The right to issue stock is itself a franchise and the State may attach such conditions to its exercise as it may deem expedient.

The primary difficulty in the way of effective legislation is not in the want, but in the exercise, of power. The State legislatures can afford adequate remedies against the evils of combination if they will act fearlessly and deal with combinations of labor in the same manner as with combinations of capital, and place the farmer and the manufacturer upon the same plane as producers — if they will hew to the line and cease enacting unconstitutional class legislation.

PART I.

CONSOLIDATION OF CORPORATIONS.

CHAPTER I.

NATURE OF CONSOLIDATION.

- § 7. Term "Consolidation" of Uncertain Meaning.
- § 8. Uses of the Term distinguished.
- § 9. Consolidation as a Result and as a Process.
- § 10. An Analogy in the Civil Law.
- § 11. Merger.
- § 12. Amalgamation.
- § 13. Distinction between Consolidation and Sale.
- § 14. Distinction between Consolidation and Lease.
- § 15. Distinction between Consolidation and Control.
- § 16. Distinction between Consolidation and Combination.

§ 7. Term "Consolidation" of Uncertain Meaning. — The term "consolidation" as used in statutes and charters authorizing the union of several corporations has not acquired, either as a result or as a process, a recognized judicial definition.¹ Extended discussion of its meaning has only served to demonstrate its uncertain signification.

¹ In *Meyer v. Johnston*, 64 Ala. 603 (1879), it was held that the words "consolidate" and "consolidation," as used in statutes authorizing and ratifying the union or combination of several railroad corporations into one, have not acquired a recognized judicial construction, which imports that all the companies are dissolved and merged into one new company; on the contrary, the terms are generally applicable to a union of two or more companies in such a way that one of them is continued in existence, though under a new name,

and with enlarged powers, while the others are merged in and absorbed by it.

Tod v. Kentucky Union Land Co., 57 Fed. 56 (1893): "The meaning to be attached to the term 'consolidation' as used in a law authorizing the consolidation of two or more corporations is uncertain. It depends often upon the particular terms of the act giving the power, and the legal effect resulting from consolidation will largely depend upon the character of the consolidation authorized by the permission as well as

There being no definition of the word generally applicable,¹ its meaning, in any case, will depend upon the terms of the particular act authorizing the consolidation, and the legal result of any consolidation will be determined by the language of the statute under which the consolidation took place and by the acts and agreements of the contracting corporations relating thereto.²

upon the contract actually entered into by the consolidating companies. Generally the merging of the companies into a new and distinct corporation is contemplated and is the legal result. Not infrequently the absorption of one corporation by the other is the consequence of consolidation."

In *Central, etc. Co. v. Georgia*, 54 Ga. 414 (1875), (reversed 92 U. S. 665 (1875)), Judge McCay, concurring, discusses the meaning of "consolidation" and distinguishes it from the English term "amalgamation."

¹ The following definitions of "consolidation" as applied to corporations have been given:

"The union or merger into one corporate body of two or more corporations which have been separately created for similar or connected purposes." Black's Law Dict. *sub nom.* "Consolidation of Corporations."

"Any conjunction or union of the stock, property, or franchises of two or more corporations whereby the conduct of their affairs is permanently, or for a long period of time, placed under one management." 1 Beach on Railways, § 535; 1 Beach on Corporations, § 326.

"The consolidation of corporations means, generally, the combination of two or more corporations of the same or different States, by an agreement, between them, under legislative authority, by which their rights, franchises, privileges, and property are united, and become the rights, franchises, privileges, and property of a single corporation, composed generally, although not necessarily, of the stockholders of the original corporations." 2 Clark & Marshall on Corporations, § 348.

Consolidation is "a method provided by law for the formation of a co-partnership between railroad corporations by which, if the expression may be used, they pool their franchises and property and are enabled to act in complete harmony under one head as a unit." *Phinizy v. Augusta, etc. R. Co.*, 62 Fed. 684 (1894).

This comparison by Judge Simonton of a consolidated corporation to a partnership should, however, be considered merely as illustrating some of its features, and not, in any sense, as defining its powers. While the illustration is not inapt and is frequently used, "a company of companies" more correctly describes a consolidated corporation than a "partnership of corporations."

In *Baltimore, etc. R. Co. v. Musselman*, 2 Grant's Cas. (Pa.) 352 (1856), the following curious illustration of the nature of consolidation appears: "It is not a case of death, for the new corporation lives from the life of the old one: their lives are transferred into it; and unlike ordinary cases of metempsychosis this translation is accompanied by full consciousness of the former state, and its liabilities."

² In *Keokuk, etc. R. Co. v. Missouri*, 152 U. S. 305 (1894), (14 Sup. Ct. Rep. 592), Mr. Justice Brown said: "In the numerous cases which have arisen in this court as to the effect of consolidation upon the existence and status of the constituent companies it has been held that the question of the dissolution of such corporations depends upon the language of the statute under which the consolidation took place."

For full consideration of this subject see ch. 6, *post*: "Effect of Consolidation"

The term "consolidation" as used in constitutional and statutory *inhibitions* is also said to have quite a different meaning from the same term as used in statutory authorizations.¹

§ 8. *Uses of the Term distinguished.* — The word "consolidation" is applied to various processes by which corporations may be united and to various results attained thereby:²

A. Two corporations may be combined by their fusion into a third corporation created in their stead. This results in the surrender of the vitality of the old corporations, the extinguishment of their special privileges and exemptions, and the springing into existence *eo instanti* of a new corporation with such powers and privileges as may be conferred upon it by the act authorizing the consolidation.³ The dissolution of all the old corporations and the creation of the new one are the essential features of this process, which has been said to constitute consolidation according to the "American view."⁴

B. There may be an absorption of one company by another whereby the former is dissolved and passes out of existence while the latter continues to exist with enlarged powers.⁵

upon Status of Consolidating Corporations and their Stockholders."

¹ See *post*, § 33: "Construction of Prohibitions — (A) Meaning of Term 'Consolidation.'"

² In *Railroad Co. v. Georgia*, 98 U. S. 362 (1878), Mr. Justice Strong said: "It is conceded that under this act a consolidation took place. It is therefore a vital question, What was its effect? Did the consolidated companies become a new corporation, holding its powers and privileges as such under the act of 1863? Or was the consolidation a mere alliance between two pre-existing corporations, in which each preserved its identity and distinctive existence? Or, still further, was it an absorption of one by the other, whereby the former was dissolved, while the latter continued to exist? The answer to these inquiries must be found in the intention of the legislature as expressed in the consolidation act."

³ The effect of the consolidation was "the dissolution of the corporations previously existing, and at the same instant the creation of a new corporation, with property, liabilities, and stockholders derived from those then passing out of existence." *McMahon v. Morrison* 16 Ind. 172 (1861), approved in *Clearwater v. Meredith* 1 Wall. (U. S.) 40 (1863). See also *post*, § 60: "*As a General Rule Effect of Consolidation is Creation of New Corporation and Dissolution of Constituents.*"

⁴ "In the American view, therefore, it would seem that the dissolution of all the corporations and the creation of one new one are essential to consolidation." Green's *Brice's Ultra Vires* (2d ed.), 631.

⁵ In *Central R., etc. Co. v. Georgia*, 92 U. S. 673 (1875), it was said that the consolidation there under consideration was intended to effect at most a "merger of the . . . Company with the

The word "consolidation" has been said to be inapplicable to a union of this character,¹ but such use of the term is general, and is supported by the highest authorities.

C. A confederation of several corporations may be formed, in which each preserves its legal identity and distinctive existence,² as exemplified in the union of corporations of different States.³ Such an alliance is sometimes called a "consolidation," but, except in the case of an interstate consolidation, it would seem that such use should be avoided if the term "consolidation" is ever to have a well-defined meaning.

§ 9. **Consolidation as a Result and as a Process.** — Consolidation may be regarded both as a result and as a process. As a result the meaning of the term is uncertain, because it is applied to different effects produced by different means; as a process it is equally indefinite, because it is employed to describe different means for producing different results. As a result and as a process, consolidation may be broadly described, but not defined, in the following language of the Supreme Court of Alabama:

*"When the rights, franchises, and effects of two or more corporations are, by legal authority and agreement of the parties, combined and united into one whole, and committed to a single corporation, the stockholders of which are composed of those (so far as they chose to become such) of the companies thus agreeing, this is in law and according to a common understanding, a consolidation of such companies; whether such single corporation, called a consolidated company, be a new one then created, or one of the original companies continuing in existence with only larger rights, capacities, and property."*⁴

other, a mode of transfer of that Company's franchise and property and payment therefor with stock of the Central Company."

See also *Meyer v. Johnston*, 64 Ala. 603 (1879).

¹ Green's Brice's *Ultra Vires* (2d ed.,) 631.

² *Railroad Co. v. Georgia*, 98 U. S. 362 (1878): "Nor was it a mere alliance or confederation of the two. If

it had been each would have preserved its separate existence as well as its corporate name."

³ *Post*, ch. 10: "Interstate Consolidation."

⁴ *Meyer v. Johnston*, 64 Ala. 656 (1879).

In *Chicago, etc. R. Co. v. Ashling*, 160 Ill. 382 (1896), (43 N. E. Rep. 373), the Court quoted the above extract from *Meyer v. Johnston* and said: "We

§ 10. **An Analogy in the Civil Law.**—The nature of consolidation may be indicated by adopting the terminology of the civil law and describing it as a process whereby the *universitas juris* of several corporations is transferred to one. This phrase expresses the legal conception of a university or bundle of rights and liabilities belonging to one person and constituting his legal personality; and when these are transferred to another he is said to take *per universitatem*, that is, he succeeds to the personality of the other and is clothed with his rights and duties.¹ So, by consolidation, one corporation acquires the rights and property of several and becomes responsible for their obligations. It succeeds to their legal personality, and may, appropriately, be said to take *per universitatem*.

§ 11. **Merger.**—The word “merger” is used, in statutes authorizing the union of corporations, to describe the process whereby the shares or the property and franchises of one or more corporations are absorbed by another which continues in existence with its original powers and with additional rights and privileges derived from the others.² This is a process of absorption to which, as has been noted, the term “consolidation” is generally applied, but to which the term “merger” is equally appropriate. In fact, had the word “consolidation” been used only to describe the process of fusion and the word “merger” been applied to the process of absorption, confusion would have been avoided.

concur in this view as a general statement of the law, subject, however, to modification by the statutes under which the consolidation is effected.”

¹ *Compton v. Wabash, etc. R. Co.*, 45 Ohio St. 592 (1888), (16 N. E. Rep. 110).

² When one railroad company is merged in another the rights and privileges of the former are transferred to the latter company to be holden in the same manner and subject to the same obligations as before, except “those corporate rights and franchises of the old company which appertain to its existence and functions as a corporation.

These become merged and extinct.” *Tomlinson v. Branch*, 15 Wall. (U. S.) 465 (1872). And in the very recent case of *Yazoo, etc. R. Co. v. Adams*, 180 U. S. 19 (1901), (21 Sup. Ct. Rep. 240), Mr. Justice Brown said: “But if, as was the case in *Tomlinson v. Branch*, one road loses its identity and is merged in another, the latter preserving its identity and issuing new stock in favor of the stockholders of the former, it is not the creation of a new corporation but an enlargement of the old one.” See also *Central R., etc. Co. v. Georgia*, 92 U. S. 665 (1875).

§ 12. **Amalgamation.** — In England the union of several incorporated companies is generally effected under authority to “amalgamate” contained in the different Companies’ Acts.¹ The word “amalgamation” belongs to the language of physical science, so that its use to denote the coalition of corporations has occasioned considerable discussion among the English judges and it has been said that “nobody really knows what amalgamation means.”² An amalgamation is said to take place, however, where two or more “companies agree to abandon their respective articles of association and to register themselves under new articles as one body. That would be a new company formed by the coalition or amalgamation of the two old companies.”³ While such use of the term is undoubtedly correct it is not applied by the English courts to such instances alone, but is used synonymously with the

¹ Railway Clauses Act, 1863 (26 & 27 Vict., ch. 92, § 37): “For the purposes of this part of this Act, companies shall be deemed amalgamated by a special Act, in either of the following cases: (1) When by the special Act two or more companies are dissolved, and the members thereof respectively are united into and incorporated as a new company. (2) When by a special Act a company or companies is or are dissolved, and the undertaking or undertakings of the dissolved company or companies is or are transferred to another existing company, with or without a change in the name of that company.”

² *Dougan’s Case*, 28 L. T. Rep. 62 (1873), 42 L. J. Ch. 460, (on appeal, 8 Ch. App. 540): “On the general principle the case seems to me this: Two companies may be united either by fusion into a third, or by one absorbing the other. The former process seems to correspond most nearly with the popular sense of the word ‘amalgamation,’ and I believe nobody really knows what ‘amalgamation’ means.”

The remarks of the English judges and the uncertain meaning of the term “amalgamation” are discussed in an ar-

ticle entitled “Amalgamation of Companies,” 17 Sol. J. & Rep. 362: “Nearly six years have elapsed since Lord Hatherly professed himself utterly at a loss to define what the ‘amalgamation’ of Joint Stock Companies is. The words to which we refer will be found prefacing the judgment *In re Empire Assurance Corporation L. R.*, 4 Eq. 341 (1867): ‘It is difficult,’ said his Honour, then Vice Chancellor Wood, ‘to say what the word “amalgamate” means. I confess at this moment that I have not the least conception of what the full legal effect of the word is.’ Six years have elapsed and so-called ‘amalgamations’ we have had by the score, but from a definition of the word, or a right understanding of its meaning, we seem, if possible, further removed than ever. . . . ‘Nobody,’ said Lord Westbury in *Blundell’s Case* (17 Sol. J. & Rep. 87), ‘uses it with any definite meaning,’ and the word which his Lordship has suggested to replace it . . . is a ‘welding.’”

See also *Wall v. London, etc. Assets Corp.* (No. 1), 67 L. J. Ch. 596 (1898), 2 Ch. 469; 79 L. T. (n. s.) 249, 47 Wkly. Rep. 219.

³ *In re Bank of Hindustan, Higg’s Case*, 2 Hem. & M. 666 (1865).

American term "consolidation."¹ A distinction has been drawn between them by an eminent writer and the term "amalgamation" has been given a somewhat wider meaning,² but such distinction does not exist as the terms are used at the present time. A comparison of recent American and English cases will show that precisely the same results have been obtained under authority to consolidate in America as under authority to amalgamate in England.³

§ 13. **Distinction between Consolidation and Sale.**—A contract between two corporations for the purchase and sale of corporate property or franchises involves no coalition of interests. The vendor corporation parts with its property. The vendee corporation pays the consideration. The transfer affects in no way the status or continued existence of either corporation.

Consolidation, on the other hand, involves a union of corporate interests, is without consideration as between the corporate entities, and may terminate the existence of one or all of the constituent corporations. "Consolidation is not sale."⁴

¹ In *Meyer v. Johnston*, 64 Ala. 603 (1879), the use of the term "amalgamation" in England is fully discussed.

² *Green's Brice's Ultra Vires* (2d ed.) (1880), 631, note: "The term 'amalgamation' is seldom applied to corporations in this country. That which takes its place as much as any is 'consolidation.' But though it is difficult accurately to define amalgamation as commonly used in English law, it certainly has a wider meaning than consolidation has with us. Consolidation would, *e. g.*, be inapplicable to a union of two or more companies, in such a way that one of the original corporations only was continued in existence, while the others were merged or absorbed in it. An absorption of one corporation by another would, according to some of the decisions, be an amalgamation in England; but it would not be a consolidation here." On the other hand, in the case of *Powell v. North Missouri R.*

Co., 42 Mo. 63 (1867), it was said that "an amalgamation implies such a consolidation as to reduce the companies to a common interest" and that where "by the very terms of the statute and the deed the first corporation was extinguished and the second only continued to exist" it was something more than a mere amalgamation or consolidation.

³ 1 *Beach on Railways*, § 535.

⁴ *Green County v. Conness*, 109 U. S. 106 (1883), (3 Sup. Ct. Rep. 69), where Mr. Chief Justice Waite said: "If only a sale of the road to another company had been authorized and made, then it might very plausibly have been contended that the purchasing company took and held it under its own charter only, without the franchises and privileges connected with it in the hands of the vendor company; but 'consolidation' is not sale, and when two companies are authorized to consolidate their roads, it is to be presumed that

In *Compton v. Wabash, etc. R. Co.*¹ the Supreme Court of Ohio said: "Whilst the transaction has some of the features, it is wanting in the essential elements, of a sale. A sale implies a vendor and a vendee, and by it the former sells and transfers a thing that he owns to the latter for a price paid or to be paid to himself. The vendor parts with nothing but his property, and for it receives a *quid pro quo*. Such is not the case where companies are consolidated under this statute. It is true that the owner of each constituent road parts with its property. But it does much more; it not only parts with its property, but ceases to be a juristical entity, capable of owning or acquiring property. It does not, and could not receive any consideration for the transfer, because it is extinguished and dissolved by the act of its stockholders in assenting to the proposed agreement. It is futile to attempt to urge that the consideration is received by the stockholders. They are not the corporation, nor do they represent it in its relation to its creditors."

§ 14. **Distinction between Consolidation and Lease.**—The same distinction may be drawn between a lease of corporate

the franchises and privileges of each continue to exist in respect to the several roads so consolidated."

In *re Bank of Hindustan*, Higg's Case, 2 Hem. & M. 666 (1865): "Take the assets and liabilities—that I can understand; but that is not any such amalgamation as Mr. Jessel suggests, but is simply a sale of its business by one company to the other The actual contract in this case was a simple sale of the business of one company to the other, and not an amalgamation in any sense."

(*Gulf, etc. R. Co. v. Newell*, 73 Tex. 334 (1889), 15 Am. St. Rep. 788 (11 S. W. Rep. 342): "A railway company by buying the stock of another and by buying the corporate franchise and property of the other, it having the power to buy, only becomes the owner of such franchise and property. Ownership alone does not operate a consolidation of that bought with the purchaser. . . . While an execution sale of the

franchise and property of a railway company conveys the franchise and property to the purchaser, still the corporate existence of the sold out company remains."

See also *Mackintosh v. Flint, etc. R. Co.*, 34 Fed. 582 (1888); *State v. Sherman*, 22 Ohio St. 428 (1872); *Houston, etc. R. Co. v. Shirley*, 54 Tex. 125 (1880); *Rafferty v. Buffalo City Gas Co.*, 37 App. Div. (N. Y.) 618 (1899), (56 N. Y. Snpp. 288). Compare *Chicago, etc. R. Co. v. Ashling*, 160 Ill. 373 (1896), (43 N. E. Rep. 373), where it was held that a consolidation and not a sale was effected by the transfer of all the stock, property and franchises of one corporation to another in exchange for its stock issued to the stockholders of the former corporation. Also *Appeal of Fame Hose Co.*, 6 Leg. Gaz. (Pa.) 79 (1874).

¹ *Compton v. Wabash, etc. R. Co.*, 45 Ohio St. 615 (1888), (16 N. E. Rep. 110).

property and franchises and a consolidation of corporations as between a sale and consolidation.

In the case of a lease the interests of the corporations as lessor and lessee are, to an extent, antagonistic, and the lessor company parts with the control of its property, and, for the term, receives a rental in lieu thereof. Consolidation, on the other hand, by whatever means accomplished, results in a *union* of corporate interests and stockholders,¹ and the stockholders of consolidating companies, through their acquisition of shares in the new corporation, still retain, to a certain extent, control of their original corporate property. "Power to consolidate," said the Supreme Court of New Jersey in *Mills v. Central R. Co.*,² "is power to take in a partner or go in as a partner, while power to lease is power to dispose of the whole concern to a stranger."

§ 15. *Distinction between Consolidation and Control.* — While one corporation by purchasing a majority of the shares of another company may obtain control of the latter, the result is radically different from a consolidation.³ In consoli-

¹ "The distinguishing feature of a consolidation is the union of the shareholders of the two companies thereby forming one company." ² Morawetz on Priv. Corp., § 939, note 2, citing *Houston, etc. R. Co. v. Shirley*, 54 Tex. 125 (1880).

² *Mills v. Central R. Co.*, 41 N. J. Eq. 7 (1886), (2 Atl. Rep. 453.)

In *State v. Vanderbilt*, 37 Ohio St. 638 (1882), the distinction between a lease and consolidation is presented from a different point of view: "By force of such lease, the right to the use of the road passed from the lessor to the lessee, according to such terms and conditions with respect to the use as are proper in a lease; but nothing else passed. The lessee is the assignee for a term or period of the lessor, — his bailee to hold possession for him. The power to lease does not imply a power to consolidate, nor does the power to consolidate imply a power to lease but these powers are distinct and independent."

See also *Commissioners v. Lafayette*,

etc. R. Co., 50 Ind. 110 (1875); *Gere v. New York Central R. Co.*, 19 Abb. N. C. 210 (1885); *Archer v. Terre Haute, etc. R. Co.*, 102 Ill. 493 (1882).

Upon the principle that constitutional prohibitions against the consolidation of competing railroads must be liberally construed for the preservation of competition, it has been held that a lease of a competing railroad comes within such a prohibition. *State v. Atchison, etc. R. Co.*, 24 Neb. 143 (1888), (38 N. W. Rep. 43); *East St. Louis, etc. R. Co. v. Jarvis*, 92 Fed. 743 (1899). The correctness of this construction is considered in another section. See *post*, § 34: "*Construction of Prohibitions — (B) Whether a Lease amounts to Consolidation.*"

³ The mere fact that one corporation has obtained control of the stock in another corporation is not, of itself, sufficient to show a consolidation of the two corporations. *Jessup v. Illinois Cent. R. Co.*, 36 Fed. 735 (1888).

In *Tod v. Kentucky Union Land Co.*,

dation there is a union of corporate interests and stockholders. In the case of the acquisition of stock the purchasing corporation becomes merely a stockholder and the rights of the corporations, as such, remain unchanged. Control is not consolidation; it is not, strictly speaking, even a conjunction of corporate properties. As said by Mr. Chief Justice Waite in *Pullman Car Co. v. Missouri Pacific R. Co.*,¹ in reference to a stockholding corporation: "Its rights and its powers are those of a stockholder only. It is not the corporation, in the sense of that term as applied to the management of the corporate business or the control of the corporate property."

§ 16. **Distinction between Consolidation and Combination.** — Combination is co-operation and, broadly speaking, a consolidated corporation illustrates the extreme development of the idea of co-operation with reference to corporations. In this treatise, however, — following the common usage — the term combination is used to describe any union of corporations entered into by mutual agreement for supposed mutual advantage, *not amounting to consolidation*.²

The distinction may be sharply drawn. The validity of a consolidation depends upon the existence of statutory authority therefor. Questions of public policy regarding consolidation are not material. Unless authorized by statute a consolidated corporation cannot be created; if authorized it is not against public policy, for that which the statute permits *cannot* be against public policy.

The validity of a combination, on the other hand, generally depends upon considerations of public policy. Statutes seldom authorize, but often prohibit, the combination of corporations.³

57 Fed. 58 (1893), reversed *sub nom.* *Marbury v. Kentucky Union Land Co.*, 62 Fed. 335 (1894), acquisition of substantially all the stock of one corporation by another was held, under the circumstances there shown, to amount to a "temporary consolidation"

¹ *Pullman Car Co. v. Missouri Pac. R. Co.*, 115 U. S. 597 (1885), (6 Sup. Ct. Rep. 194). Compare *Pennsylvania R.*

Co. v. Commonwealth (Pa. 1886), 7 Atl. Rep. 368.

² See *post*, Part V., "Combinations of Corporations."

³ An alliance or voluntary union between two railway companies with respect to traffic does not amount to an amalgamation. *Shrewsbury, etc. R. Co. v. Stour Valley R. Co.*, 2 De Gex, M. & G. 880 (1852), 21 Eng. Law

CHAPTER II.

LEGISLATIVE AUTHORITY FOR CONSOLIDATION.

I. *Necessity for Legislative Authority.*

- § 17. Consolidation without Legislative Authority *ultra vires*.
- § 18. Consolidation of *Quasi-public* Corporations without Legislative Authority against Public Policy.

II. *Conferring and Withdrawal of Legislative Authority.*

- § 19. Power of Legislature to authorize Consolidation.
- § 20. Legislative Sanction — How expressed.
- § 21. Public Policy regarding Consolidation of Non-competing Railroads.
- § 22. What Railroads may consolidate — Statutory Provisions.
- § 23. What Business Corporations may consolidate — Statutory Provisions.
- § 24. Power of Legislature to withdraw or limit Right to consolidate — (A) In Absence of Reserved Power.
- § 25. Power of Legislature to withdraw or limit Right to consolidate — (B) In Exercise of Reserved Power.
- § 26. Power of Legislature to withdraw or limit Right to consolidate — (C) In Exercise of Police Power.

III. *Construction of Statutes authorizing Consolidation.*

- § 27. General Rules of Construction.
- § 28. Construction of Particular Statutory Provisions.
- § 29. Construction of Statutes authorizing Consolidation of Railroads — Connecting or Continuous Lines.
- § 30. Construction of Statutes authorizing Consolidation of Business Corporations.

I. *Necessity for Legislative Authority.*

§ 17. Consolidation without Legislative Authority *ultra vires*.
— The charter of a corporation read in connection with the

& Eq. 628. See also *Midland Great Western R. Co. v. Leech*, 3 H. L. Cas. 872 (1852).

A temporary co-operation under one management does not constitute a consolidation. *Archer v. Terre Haute R. Co.*, 102 Ill. 503 (1882), (7 Am. & Eng. R. R. Cas. 249), where the court said: "Both corporations retained their separate existence, and it does not appear it was ever contemplated the two roads should be merged into one and both corporations pass to one management. The very terms of the agree-

ment are inconsistent with the idea of consolidation. It follows, then, it was simply a contract for connecting the roads of the respective companies, so as to secure a continuous line between distant terminal points."

A business arrangement made under special statutory authority, with a view to operating the road of another company as a branch line, does not effect a consolidation. *Pingree v. Michigan Central R. Co.*, 118 Mich. 314 (1898), (76 N. W. Rep. 635).

general laws applicable to it, is the measure of its powers. The enumeration therein of powers conferred implies the exclusion of other powers, and a corporation can exercise no authority not granted to it, expressly or by necessary implication, in its charter or other legislative act.¹

There is also said to be an implied contract as well between the corporation and the State as between the corporation and its stockholders that its corporate property and franchises shall only be appropriated to uses authorized by its charter, and any acts of the corporation outside the limits so prescribed are *ultra vires*.² Consolidation necessitates the embarkation of corporate properties upon a new undertaking — a joint adventure instead of an individual enterprise — and is *ultra vires* unless authorized by legislative authority.³

In so far, also, as consolidation involves the creation of a new corporation, legislative authority is as essential as it is

¹ Central Transp. Co. v. Pullman Car Co., 139 U. S. 24 (1891), (11 Sup. Ct. Rep. 478).

"A charter being a contract giving a corporation all the powers which it can exercise, any alteration which the corporation desires to make therein must in the first place have the sanction of the legislature." Green's Brice's *Ultra Vires* (2d ed.), 632.

² Black v. Delaware, etc. Canal Co., 24 N. J. Eq. 465 (1873); Abbott v. Johnston, etc. Horse R. Co., 80 N. Y. 27 (1880), (36 Am. Rep. 572).

³ In Pearce v. Madison, etc. R. Co., 21 How. (U. S.) 442 (1858), Mr. Justice Campbell said: "The rights, duties, and obligations of the defendants are defined by the acts of the Legislature of Indiana under which they were organized, and reference must be had to these to ascertain the validity of their contracts. They empower the defendants respectively to do all that was necessary to construct and put in operation a railroad between the cities which are named in the acts of incorporation. There was no authority of law to consolidate these corporations and to place both under the same management, or to

subject the capital of the one to answer for the liabilities of the other."

See also New York, etc. Canal Co. v. Fulton Bank, 7 Wend. (N. Y.) 412 (1831); Blatchford v. Ross, 54 Barb. (N. Y.) 42 (1869); Greenville Compress, etc. Co. v. Planters' Compress, etc. Co., 70 Miss. 669 (1893), (13 So. Rep. 879, 35 Am. St. Rep. 681); Kavanaugh v. Omaha Life Assn., 84 Fed. 295 (1897); Home Friendly Soc. v. Tyler (Com. Pl.), 9 Pa. Co. Ct. Rep. 617 (1891). Re Era Ins. Soc., 30 Law J. Eq. (N. S.) 137 (1860), (6 Jur. (N. S.) 1334, 9 Week. Rep. 67). In Clinch v. Financial Corp., L. R. 4 Ch. App. 117 (1868), it was held that an arrangement for amalgamation by which liabilities were imposed on the stockholders was void as *ultra vires* and *semble* that such an arrangement would be void, even if only the shareholders who assented to it were bound by it.

Many of the railroad cases cited in note to section 18 *post*, while illustrating the principle that franchises may not be transferred without legislative sanction upon grounds of public policy, also support the principle stated in the text, applicable to *all* corporations, that an unauthorized consolidation is *ultra vires*.

to the creation of a corporation in the first instance. An attempt at the organization of a consolidated corporation in the absence of a statutory provision for consolidation does not even create a corporation *de facto*, since corporations *de facto* can only exist when there is a law under which they may be incorporated.¹

§ 18. Consolidation of Quasi-public Corporations without Legislative Authority against Public Policy. — There is another principle, in addition to that of *ultra vires*, why a railroad company or other *quasi*-public corporation² cannot transfer its franchises to another corporation, through the process of consolidation, without the sanction of the legislature which granted them. That principle is, that where such a corporation has had granted to it, by its charter, franchises and privileges to enable it to provide facilities for the benefit of the public, it assumes the due performance of those functions as the consideration of the grant, and any contract or arrangement which disables it from performing its public duties — which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantee of the burden imposed — is a violation of the contract with the State and against public policy.³ An attempted consolidation, therefore, with-

¹ American Loan, etc. Co. v. Minnesota, etc. R. Co., 157 Ill. 641 (1895), (42 N. E. Rep. 153). See "*Irregular and Invalid Consolidations*," ch. 9, *post*.

² It is generally held that a railroad company is a *quasi*-public corporation. The State grants it extraordinary powers—the right to condemn lands and take tolls for the public benefit. In accepting its charter it assumes obligations to the State and to the public, and to that extent is a public corporation. (Peoria, etc. R. Co. v. Coal Valley Mining Co., 68 Ill. 489 (1873)). On the other hand the stockholders furnish the means for the construction and equipment of the railroad, and are entitled to the profits derived from its operation. To this extent, a railroad company is a private

corporation. Being thus at once a public corporation existing for private gain and a private corporation owing public duties, a railroad company is called, with propriety, a *quasi*-public corporation. See United States v. Trans-Missouri Freight Ass'n., 166 U. S. 321 (1897), (17 Sup. Ct. Rep. 540); Black v. Delaware, etc. Canal Co., 24 N. J. Eq. 469 (1873); Chicago, etc. R. Co. v. Wabash, etc. R. Co., 61 Fed. 997 (1894). In Pierce v. Commonwealth, 104 Pa. St. 155 (1883), however, it was denied that a railroad company is a *quasi*-public corporation, and it was said to be "a private corporation and nothing more."

³ Thomas v. Railroad Co., 101 U. S. 71 (1879).

out legislative sanction, is opposed to public policy and void.¹

An unauthorized consolidation of corporations owing public duties is also invalid as involving a delegation of corporate powers.²

II. *Conferring and Withdrawal of Legislative Authority.*

§ 19. **Power of Legislature to authorize Consolidation.** — So far as the public rights are concerned, the power of the legislature to authorize a consolidation of corporations is, in the absence of special constitutional restrictions, unquestioned.³ The State has the same power to authorize several existing corporations to associate together and organize themselves into a new corporation as it has to incorporate individuals.⁴ It has been held, however, that corporations are not such "persons" as may themselves form corporations.⁵

As a consolidated corporation becomes a new and distinct

¹ *United States: Clearwater v. Meredith*, 1 Wall. 39 (1863); *Shields v. Ohio*, 95 U. S. 322 (1877); *Louisville, etc. R. Co. v. Kentucky*, 161 U. S. 677. (1896), (16 Sup. Ct. Rep. 714).

Illinois: American Loan, etc. Co. v. Minnesota, etc. R. Co., 157 Ill. 641 (1895), (42 N. E. Rep. 153).

Indiana: State v. Bailey, 16 Ind. 46 (1861); *Shelbyville, etc. Turnpike Co. v. Barnes*, 42 Ind. 498 (1873); *State v. Beck*, 81 Ind. 500 (1882); *Crawfordsville, etc. Turnpike Co. v. State*, 102 Ind. 435 (1885), (1 N. E. Rep. 864).

Mississippi: Adams v. Yazoo, etc. R. Co., 77 Miss. 194 (1899), (24 So. Rep. 200); *affirmed*, 180 U. S. 1 (1901), (21 Sup. Ct. Rep. 240).

New Jersey: Black v. Delaware, etc. Canal Co., 24 N. J. Eq. 455 (1873); *Mills v. Central R. Co.*, 41 N. J. Eq. 1 (1886), (2 Atl. Rep. 453).

Pennsylvania: Lauman v. Lebanon Valley R. Co., 30 Pa. St. 42 (1858), (72 Am. Dec. 685).

Texas: East Line, etc. R. Co. v. State, 75 Tex. 434 (1889), (12 S. W. Rep. 690); *Gulf, etc. R. Co. v. Newell*,

73 Tex. 334 (1889), (11 S. W. Rep. 342); *Missouri Pac. R. Co. v. Owens*, 1 White & W. Civil Cas. Ct. App. § 385 (1883).

England: Charlton v. Newcastle, etc. R. Co., 5. Jur. (N. S.) 1096 (1859).

The principle that the franchises of quasi-public corporations cannot be transferred by the process of consolidation applies equally to any form of transfer—sale or lease—and is supported by cases referring to any form (see *post*, ch. 12, 16). An attempt has been made, however, to classify the cases under their distinctively appropriate heads.

² See *post*, ch. 12: "Sales of Franchises."

³ *Clearwater v. Meredith*, 1 Wall. (U. S.) 39 (1863); *Black v. Delaware, etc. Canal Co.*, 24 N. J. Eq. 455 (1873).

⁴ *State Treasurer v. Auditor General*, 46 Mich. 233 (1884), (9 N. W. Rep. 258).

⁵ *Factors, etc. Ins. Co. v. New Harbor Protection Co.*, 37 La. Ann. 233 (1885). See also *post*, § 266.

corporation, a special act authorizing consolidation contravenes a constitutional provision against the creation of corporations by special act.¹ For the same reason a consolidated corporation may be organized for the full statutory period irrespective of the terms of existence of the constituent corporations, and it cannot be objected that the consolidation in effect extends the existence of such corporations beyond the period fixed by law.²

The existence of an outstanding contract between a constituent corporation and an individual does not prevent the legislature from authorizing a consolidation upon the ground that the obligation of such contract would be impaired, where the act of consolidation provides that the consolidated company shall assume and discharge the liabilities of the constituent corporations. In such a case it was said by the Supreme Court of the United States that "proper care was taken by the legislature to protect the rights of these complainants by incorporating into the act uniting the two colleges a provision that the new corporation should discharge and perform those liabilities without diminution or abatement. Such contracts were made with the trustees, and not with the State, and it is a mistake to suppose that the existence of such a contract between the corporation and an individual would inhibit the legislature from altering, modifying, or amending the charter of the corporation by virtue of a right reserved to that effect, or with the assent of the corporation, if in view of all the circumstances the legislature

¹ *Shields v. Ohio*, 95 U. S. 323 (1877): "If the argument of the learned counsel for the plaintiff in error be correct, the constitutional restrictions can be readily evaded. Laws may be passed at any time, enacting that all the valuable franchises of designated corporations antedating the Constitution shall, upon their dissolution, voluntary or otherwise, pass to and vest in certain newly created institutions of the like kind. The claim of the inviolability of such franchises should rest on the same foundation as the affirmation in the present case.

The language is broad and clear, and forbids a construction which would permit such a result."

² The consolidated corporation becomes a new and distinct corporation which may be organized for the term of fifty years, irrespective of the term of existence of the constituent corporations, and it cannot be objected to the consolidation that it has the effect to extend the existence of the constituent corporations beyond the period of fifty years fixed for each of them. *Market St. R. Co. v. Hellman*, 109 Cal. 571 (1895), (42 Pac. Rep. 225).

should see fit to exercise that power.”¹ In a still earlier case it was intimated by the same Court that a consolidation might be authorized without special provision being made for the creditors of the constituent companies.²

State legislation authorizing the consolidation of railroad corporations of several States is not a regulation of interstate commerce in violation of the Constitution of the United States, in the absence of action by Congress. The fact that Congress has the *power* to legislate upon the subject does not take away the power of the State. In *Boardman v. Lake Shore, etc. R. Co.*,³ the New York Court of Appeals said: “It is not the power itself, but its exercise, that is inconsistent with the exercise of the same power by the State legislature. It is the establishment of such laws by Congress as are inconsistent

¹ *Pennsylvania College Cases*, 13 Wall. (U. S.) 222 (1871).

² *Smith v. Chesapeake, etc. Canal Co.*, 14 Pet. (U. S.) 48 (1840): “There can be no doubt that the States of Virginia and Maryland in granting the charter of the Chesapeake and Ohio Canal Company had the power to authorize a surrender of the charter of the Potomac Company, with the consent of the stockholders; and to make the provision which they did make for the creditors of the company. This assignment does not impair the obligation of the contract of any creditor of the company, nor place him in a worse position in regard to his demand. The means of payment possessed by the old company are carefully preserved and, indeed, guaranteed by the new corporation. And if the fact can be established, which is denied by the defendants, that some *bona fide* creditors of the Potomac Company were unprovided for in the new charter, and consequently have no redress against the defendant, it does not follow that they are without remedy.”

³ *Boardman v. Lake Shore, etc. R. Co.*, 84 N. Y. 185 (1881). The Court also said: “There is, we think, no force in the position that the acts of the legislatures of the several States through

which the railroads run, so far as they relate to or authorize the consolidation in the adjoining States, are in violation of subdivision 3 of section 8 of the first article of the Constitution of the United States, which confers upon Congress the power ‘to regulate commerce with foreign nations and among the several States.’ It is not claimed that Congress has legislated in respect to the subject, or assumed to exercise the power conferred by the Constitution, and it has not yet been decided that the provision cited requires that the power conferred should be exercised by Congress alone, and is taken away entirely from the control of the State legislatures. The conclusion, therefore, is inevitable that in the absence of such legislation by Congress, the power exists in the State to legislate upon the subject.”

The proposition — not necessary to the decision — that the State, in the absence of Congressional action, may legislate concerning interstate commerce *eo nomine*, is not good law. See *Chicago, etc. R. Co. v. Solan*, 169 U. S. 133 (1898), (18 Sup. Ct. Rep. 289). Also *Louisville, etc. R. Co. v. Kentucky*, 161 U. S. 701 (1896), (16 Sup. Ct. Rep. 714).

with the laws of the State and not the right to establish a uniform system."

§ 20. **Legislative Sanction — How expressed.** — Legislative approval of consolidation may be expressed in various ways. A grant of power to consolidate contained in the charters of the constituent corporations or in general laws passed prior to their incorporation furnishes undoubted authority.¹ Acts passed subsequent to the incorporation of the companies but prior to their consolidation, are, subject to constitutional objections to be hereafter noticed,² sufficient.³

It is not essential that authority should be granted before consolidation. The legislature can validate after the fact that which it may authorize in the first instance, and a subsequent act ratifying an informal consolidation has the same effect as a prior grant of power.⁴ Express ratification is not necessary. Recognition by the legislature of the consolidated corporation cures any defect arising from the want of legislative authority to consolidate.⁵ Legislative recognition amounts to legislative ratification. General statutes authorizing the consolidation of corporations are, however, not retroactive and do not apply to consolidation agreements made prior to their enactment.⁶

¹ *Fisher v. Evansville, etc. R. Co.*, 7 Ind. 407 (1856).

² *Post*, § 43.

³ *Sparrow v. Evansville, etc. R. Co.*, 7 Ind. 369 (1856).

⁴ "The legislature has the same power to ratify and confirm an irregularly organized corporate body that they have to create a new one. And by the act confirming the consolidation before then entered into, the corporate body which was organized in accordance with the act of consolidation, became legal, notwithstanding such organization may have been irregular." *Mitchell v. Deeds*, 49 Ill. 416 (1867), (95 Am. Dec. 621).

See also *Racine, etc. R. Co. v. Farmers Loan, etc. Co.*, 49 Ill. 331 (1868), (95 Am. Dec. 595). *Bishop v. Brainerd*, 28 Conn. 289 (1859).

⁵ The passage of a legislative act whereby the existence of a consolidated corporation is expressly recognized is a ratification of and legalizes the consolidation. *Louisville Trust Co. v. Louisville, etc. R. Co.*, 75 Fed. 433 (1896). See also *United States v. Southern Pac. Co.*, 45 Fed. 596 (1891); *Mead v. New York, etc. R. Co.*, 45 Conn. 199 (1877); *Atlantic, etc. R. Co. v. St. Louis*, 66 Mo. 228 (1877); *McCauley v. Columbus, etc. R. Co.*, 83 Ill. 352 (1876).

⁶ *Hatcher v. Toledo, etc. R. Co.*, 62 Ill. 480 (1872): "The law is not retrospective in terms and cannot be made so by any fair construction. . . . It is manifest that this act was intended to apply to companies which might effect a consolidation after its passage."

§ 21. **Public Policy regarding Consolidation of Non-competing Railroads.**— Although authority to amalgamate has been granted, by special act, to railroad companies in England, it may be said that the public policy of that nation, as manifested by acts of Parliament and by the appointment of parliamentary committees to investigate the subject, is opposed to the consolidation of such companies.¹

In America, however, the public policy of nearly all the States, as indicated by the enactment of general consolidation acts, is in favor of the consolidation of non-competing railroad corporations. The Court of Appeals of New York has said that “whatever may be the rule in other States or in England, the public policy of this State, as manifested by numerous acts of the legislature, has always been not only to afford the fullest scope for the consolidation and reorganization of non-competing railroads and railroad corporations, but also for the transfer of the use of such roads and their franchises by one corporation to another.”² It has, also, been said in regard to the Illinois statutes authorizing consolidation and their construction by the courts of that State that “great encouragement has been given to the union of lines of railroad for the purpose of having them operated under some general management, the result of which has been the consolidation of many lines of road which were originally separate and distinct, but which are now operated under a uniform system.”³

The public policy of Illinois has, however, been *adverse* to the consolidation of domestic railroad companies with those of other States.⁴

¹ One ground of objection is indicated in *East Anglian R. Co. v. Eastern Counties R. Co.*, 11 Com. B. 812 (1851): “The public also has an interest in the proper administration of the powers conferred by the act. The comfort and safety of the line may be seriously impaired if the money supposed to be necessary and destined by Parliament for the maintenance of the railway, be expended in other undertakings not contemplated when the act was ob-

tained and not expressly sanctioned by the legislature.”

² *Woodruff v. Erie R. Co.*, 93 N. Y. 615 (1883).

³ *Dimpfel v. Ohio, etc. R. Co.*, 9 Biss. (U. S.) 127 (1879), (8 Rep. 641, 7 Fed. Cas. 722).

⁴ In *American Loan, etc. Co. v. Minnesota, etc. R. Co.*, 157 Ill. 641 (1895), (42 N. E. Rep. 153), the Supreme Court of Illinois said: “This legislation taken in connection with the

§ 22. **What Railroads may consolidate — Statutory Provisions.** — Nearly all the States have general railroad consolidation statutes, of which, an abstract is printed in the subjoined note.¹

specific repeal of the act of 1854 seems to indicate a legislative public policy adverse to the consolidation of railroad companies organized under the laws of this State with railroad companies formed in other States. And the same general policy seems to be denoted by the proviso to the act approved March 30, 1875. . . . The proviso is, that nothing in that act shall be so construed as to authorize any corporation acting by or organized under the laws of any other State to purchase or otherwise become the owner of any railroad in this State."

¹ *Alabama.* Civil Code (1896), ch. 28, § 1166 (as amended by acts 1900-01, p. 237): "Whenever the lines of any two or more railroads, or contemplated railroads, chartered under the laws of this or any other State which, when completed, may admit passage of cars over any two or more of such roads continuously without break or interruption," such companies may consolidate.

Arizona. Rev. Stat. 1901, par. 864: Railroad corporations shall have power "to consolidate with one or more corporations formed under this title, or under the laws of any other State or Territory."

Arkansas. Sand. and Hill's Digest (1894), § 6314: "Any two or more railroad companies in this State . . . owning railroads . . . which . . . form a continuous line or railroad, continuing and running in the same general direction are hereby authorized to consolidate their stock and make joint stock with any connecting railroad, whether within or without this State, and form one company, owning and controlling such continuous line of road."

Sections 6319 and 6320 provide for the consolidation of domestic corporations with those of an adjoining State making a "continuous line." See also *ib.* § 6328.

California. Pomeroy's Civil Code (1901), § 473: "Any railroad company incorporated under the laws of this State may consolidate with one or more railroad companies incorporated under the laws of this State, or under the laws of any other State or Territory of the United States."

Colorado. Mill's Anno. Stat., § 604: "Any railroad company . . . of this State whose . . . road is made . . . to the boundary line of the State, or to any point either in or out of the State" may merge and consolidate with "any railroad company or companies . . . of any adjoining State or Territory whenever the two or more railroads of the companies or corporations . . . shall or may form a continuous line of railroad with each other or by means of an intervening railroad."

For consolidation statute applying to any corporation see *ib.* § 628.

Connecticut. Gen. Stat. (1888), § 3443: "Any railroad corporation incorporated under the laws of this State for the purpose of building and operating railroads within this State extending to or beyond the boundary line of this State may consolidate . . . with . . . any other incorporated railroad company whose line of road . . . is situated wholly outside this State."

Delaware. Laws 1901 (Corp. Law), § 91: "Any railroad of this State" may "consolidate with any other railroad company incorporated under the laws of this State, or any other State of the United States, whose railroads within or without this State shall connect, or form a continuous line, with the railroad of the company so consolidated."

For other railroad consolidation statutes see Laws 1901 (Corp. Law), § 123. Laws 1899 (Corp. Law), §§ 88, 121.

Florida. Rev. Stat. 1891, § 2248: "Any railroad . . . in this State shall have power . . . to make and enter

These statutes, as a general rule, provide only for the consolidation of corporations owning connecting or continuous

into contracts with any railroad . . . which has constructed or shall hereafter construct any railroad . . . within this State or in another State, as will enable said company to run their road in connection with each other, and to merge their stock, or to consolidate with any company within or without this State."

Georgia. Code 1895, vol. 2; § 2179: "Any railroad company incorporated under the provisions of this article shall have authority . . . to consolidate the same with those of any other railroad company incorporated under the laws of this or any other State or of the United States whose railroad within or without this State shall connect with or form a continuous line with the railroad of the company incorporated under this law upon such terms as may be agreed upon."

See also Code, § 2173.

Idaho. Laws 1899, p. 113, as amended by Laws 1901, p. 214: "Any railroad corporation chartered by or organized under the laws of this State, or of any State or Territory or under the laws of the United States, and authorized to do business in this State, may consolidate its stock . . . with any other railroad corporation whether within or without the State, when such other railroad corporation does not own any competing line of railroad."

Illinois. Rev. Stat. 1901, p. 1376, § 39: "Whenever any railroad which is situated partly in this State, and partly in one or more other States; and heretofore owned by a corporation formed by consolidation of railroad corporations of this or any other States, has been sold pursuant to the decree of any court . . . and the same has been purchased as an entirety, and is now, or . . . may be held in the name or as the property of two or more corporations, incorporated respectively under the laws of two or more of the States in which said railroad is situated, it shall

be lawful for the corporation so created in this State to consolidate . . . with the . . . corporation or corporations of such other State or States. . . . Provided, that no consolidation shall take place with any railroad owning a parallel or competing line."

Indiana. Burns' Anno. Stat. Rev. 1901, § 5215: "Any railroad company incorporated under the provisions of this act shall also have power to consolidate with other railroad corporations in a continuous line either within or without this State upon such terms as may be agreed upon by the corporations owning the same." This act does not permit consolidation with other *Indiana* railroads equipped and in operation.

For statutes permitting consolidation generally of steam or electric railroads see *ib.* §§ 5257, 5258, 5262.

Iowa. Code 1897, § 2036: "Any corporation organized under the laws of this State for the purpose of constructing and operating a railway may join, intersect, and unite its railway with that of any other corporation at such point upon the boundary line of this State as may be agreed upon, and . . . may merge and consolidate the stock, property, franchises, and liabilities of such corporations, making the same one corporation upon such terms as may be agreed upon not in conflict with the law."

Kansas. Gen. Stat. ch. 70, § 92: "Any two or more railroad companies in this State, existing under general or special laws, and owning connecting lines of railroad in this State . . . and any railroad organized as aforesaid and any railroad company duly organized and existing under the laws of any other State or Territory, whose lines of railroad shall connect at the State line" may consolidate.

Kentucky. Stat. 1899, ch. 32, § 770: "Any two or more companies may, unless otherwise provided by law, con-

lines of railroad, although a varying phraseology is employed in expressing the legislative intention. The reason for pro-

solidate into a single company in the manner provided in Article 1 of this chapter."

Louisiana. Rev. Laws 1897 (Act 38, 1882, p. 50), page 758: "Any railroad company or companies organized under the laws of this State, general or special, shall have the right and power to consolidate with any railroad company or companies organized under the laws, general or special, of any other State and form thereby a new corporation. . . ."

Rev. Laws 1897 (Act 39, 1877, p. 50), page 757: "Every railroad corporation in this State whether created under a general or special law, or existing by virtue of a charter or law of this or any other State," can consolidate with "any other railroad corporation of this or any other State whose road shall connect with or intersect the road of such railroad corporation or any branch thereof."

Maryland. Laws 1890, ch. 553: "Any railroad company . . . of this State" may "consolidate with any other railroad company incorporated under the laws of this or any other State, or of the United States, whose railroad within or without this State shall connect with or form a continuous line with the railroad of the company so consolidating."

Michigan. Pub. Acts 1899, p. 459, § 29: "Any railroad company in this State forming a continuous or connecting line with any other railroad company, may consolidate with such other company, either in or out of this State, or partly within or partly without this State."

Minnesota. Gen. Stat. 1894, § 2715: "Any railroad corporations . . . of the State or Territory of Minnesota, or . . . of any other State or States or Territory, whose lines of railroad now or hereafter constructed within or without this State, can be lawfully connected and operated together to constitute one

continuous main line, with or without branches, so as to admit of the passage of trains over them without break or interruption, may consolidate."

Ib. § 2718: "Whenever the lines of railroad of any railroad corporation whether organized under this title by virtue of a special charter, or any portion of such lines, have been or may be constructed so as to admit the passage of freight or passenger cars over any two or more of such roads continuously, without break or interruption, such corporations may consolidate themselves into a single corporation."

Mississippi. Anno. Code 1892, § 3577: "Every railroad corporation organized under the provisions of this chapter shall have and exercise the following powers: (§ 3587) "To consolidate with any other railroad company in or out of this State, with the consent of the railroad commission, upon such terms as the consolidating companies may agree upon; but a consolidation shall not be made with a parallel or competing road."

Missouri. Rev. Stat. 1899, § 1059: "Any two or more railroad companies in this State, existing under either general or special laws, and owning railroads wholly or in part which, when completed and connected, will form in whole or in the main, one continuous line of railroad," are authorized to consolidate.

Ib. § 1060 provides for furnishing aid to and consolidating with connecting railroads.

Montana. Civil Code 1895, vol. 2, § 911: "Any two or more railroad corporations whose respective lines, not being parallel or competing lines, are wholly or partly within this State, whether chartered by or organized under the laws of the State or Territory of Montana or of the United States, or of any other State or Territory, when their respective lines of road, or any branch thereof, so connect within this State that

visions of this character is that the creation of the through line conduces to the public convenience and welfare by in-

they may operate together as one property, may consolidate."

Ib. § 890: "Any railroad corporation . . . may consolidate with any road not a parallel or competing line."

Ib. § 923 provides for consolidation of domestic with domestic or foreign railroads.

Nebraska. Comp. Stat. 1901, § 1764: "Whenever the lines of railroad of any railroad companies in this State, or any portion of such lines, have been or may be constructed, so as to admit passage of burden or passenger cars over any two or more of such roads continuously, without break of gauge or interruption," such companies may consolidate.

Nevada. Gen. Stat. (1885), § 874: "Two or more railroads" may "amalgamate and consolidate their capital stock, debts, property, assets, and franchises."

New Hampshire. Laws 1901, ch. 156, § 22 (p. 503): "If two or more railroad corporations at meetings of their respective stockholders . . . have agreed by a two-thirds vote of the stock represented and voting at such meetings, to unite and form a single corporation," petition is made to the Supreme Court to see that the public good will be promoted by such a union, and if the court determines that the public good requires it, the other conditions being complied with, they shall authorize the union to be made.

New Jersey. Gen. Stat. (1895), R. R. Law, par. 55, p. 2651: "Any corporation incorporated under this act or any of the laws of this State" may "consolidate . . . with . . . any other company or companies of this or any other State."

Ib. par. 82, p. 2659: "All railroad corporations, now or hereafter organized under the act to which this is a supplement, whose railroads form connecting lines by means of the intervening line or lines of railroad of any other railroad

corporation or corporations, also organized or to be organized under said act, and which, if having continuous lines, would have the right under the laws of this State to merge and consolidate. . . . may so . . . consolidate, notwithstanding that their lines are not continuous but are connected by such intervening line or lines."

Ib. par. 249, p. 2696: "Railroad corporations chartered by . . . the laws of this State, and whose railroads . . . lie wholly within this State, and which have been authorized to hold other railroads under lease or to lease their properties, and which said corporations are now bound by contracts of lease, and also such corporations whose railroads are now constructed and lying within the State as are now authorized to consolidate . . . [are authorized] to absolutely consolidate."

Ib. par. 280, p. 2703, as amended by par. 289, p. 2705: "Any railroad company or corporation organized under the laws of this State" may "merge and consolidate . . . with . . . any railroad company or companies of this State whenever the said railroads . . . shall or may form connecting or continuous line or lines of railroads."

Ib. par. 312, p. 2709: "No corporation incorporated under the act entitled 'an act to authorize the formation of railroad corporations and to regulate the same' . . . or under any other law or charter enacted or granted by the legislature of this State, shall have power . . . to unite, consolidate, or merge . . . with any foreign corporation until the consent of the legislature of this State shall have been first obtained."

New Mexico. Comp. Laws 1897, § 3892: "Any railroad company . . . organized under the law of this Territory or of this Territory and any other Territory or State . . . operating . . . either wholly within or partly within and partly without this Territory," may consolidate with "any other railroad company or

creasing facilities for travel and permitting lower rates, while the combination of separate and disconnected roads would

companies organized under the laws of this Territory, or under the laws of this Territory and any other Territory or State whenever the two or more railroads . . . shall or may form a continuous line of railroad with each other, or by means of an intervening railroad, bridge, or ferry."

New York. Birdseye's Rev. Stat. 1896 (R. R. Law, § 70), p. 2552: "Any railroad or other corporation, organized under the laws of this State, or of this State and any other State, and owning or operating a railroad . . . either wholly within or partly within and partly without the State, or whose lines or routes of road have been located but not constructed, may merge and consolidate its capital stock, franchises, and property with the capital stock, franchises, and property of any other railroad . . . corporation or corporations organized under the laws of this State, or of this and any other State, or under the laws of any other State or States, whenever the two or more railroads of the companies or corporations, so to be consolidated, . . . or branches of any part thereof, or the line or routes of their roads if not constructed, shall or may form a continuous or connected line of railroad with each other or by means of an intervening railroad bridge, tunnel, or ferry."

Ib. (R. R. Law, § 80) p. 2557: "No railroad corporation or corporations owning or operating railroads whose roads run on parallel or competing lines, except street surface railway corporations, shall merge or consolidate or enter into any contract for the use of their respective roads or lease the same, the one to the other, unless the board of railroad commissioners of the State or a majority of such board shall consent thereto."

North Dakota. Rev. Codes 1899, § 2954: "Any railroad corporation, organized and existing under the laws of the Territory of Dakota or State of

North Dakota or existing by consolidation of different railway companies under the laws of such Territory or State, and of any other Territory or State, may consolidate . . . with any other railroad corporation, whether within or without the State, when their respective railroads can be lawfully connected and operated together to constitute one continuous main line."

Ohio. Bates Anno. Stat. (1787-1902), § 3379: "When the lines of road of any railroad companies in this State, or any portion of such lines, have been or are being so constructed as to admit the passage of burthen or passenger cars over any two or more of such roads continuously, without break or interruption, such companies may consolidate."

Ib. § 3380: "A company organized in this State . . . whose line of road is made or is in process of construction to the boundary line of this State, or to any point either in or out of this State, may consolidate . . . with . . . any company in an adjoining State . . . whose line of road has been projected . . . or is in process of construction, to the same points when the several roads so united or constructed will form a continuous line for the passage of cars."

Oklahoma. Stat. 1893, ch. 17 § 15, par. 1016: "Any railroad corporation may consolidate its stock, franchises, and property with any other railroad corporation, whether within or without the Territory, when their respective railroads can be lawfully connected and operated together to constitute one continuous main line with or without branches."

Pennsylvania. Bright. Purd. Dig. (1894), § 107, p. 1801: "It shall be lawful for any railroad company chartered by this commonwealth to merge its corporate rights . . . into any other railroad company so chartered, connecting therewith."

not only serve no public purpose but might tend to prevent competition.

Ib. § 114, p. 1803: "Any railroad company or corporation, organized under the laws of this commonwealth, and operating a railroad, either in whole within, or partly within and partly without this State," may "merge and consolidate . . . with any other railroad company or companies or corporations organized and operated under the laws of this or any other State, whenever the two or more railroads . . . shall or may form a continuous line of railroad with each other, or by means of an intervening railroad."

Ib. § 126, p. 1805: "Any railroad company or corporation duly organized under the laws of this State . . . operating a railroad either wholly or partly within and partly without this State," may "consolidate . . . with any other railroad companies or corporations organized under the laws of this or any other State, whenever the two or more railroads of the companies or corporations . . . shall or may form . . . a continuous line of railroad with each other, or by means of any intervening railroad; and such consolidation may be effected in accordance with the laws of this commonwealth, and either under special or general statutes of other States."

Ib. § 182, p. 1814, authorizes consolidation of particular railroads.

South Carolina. Rev. Stat. 1893 (as amended by laws 1901, No. 406), § 1615: "Any railroad company . . . of this State, operating a railroad whether wholly within, or partly within and partly without, this State," may "merge and consolidate . . . with . . . any other railroad company or companies organized and operated under the laws of this or any other State, whenever two or more railroads of the companies . . . are continuous or are connected with each other or by means of an intervening railroad."

Ib. § 1546: "Such companies' [railroad] shall have the power and authority

. . . to purchase, lease, or consolidate with any other railroad or railroads in or out of this State in such manner and upon such terms as may be agreed between such railroad companies."

South Dakota. Anno. Stat. 1901, § 3906: "Any company owning or operating a railroad within this State may extend its road into any other State or Territory, and may build, buy, lease, or be consolidated with any railroad or railroads in such other State or Territory."

Tennessee. Code 1896, § 1522: "Every railroad corporation existing in this State . . . or . . . of any other State . . . and having authority to operate and maintain a railroad in this State, shall have power to consolidate itself with any other railroad corporation, whose road shall connect with or intersect the road of such existing railroad corporation or branch thereof."

Ib. § 1532 also authorizes consolidation.

Texas. Sayles' Texas Civil Stat. 1897 (Supp. to 1900), art. 4531: "No railroad company organized under the laws of this State shall consolidate . . . with any railroad company organized under the laws of any other State or of the United States."

Utah. Laws 1901, ch. 26, § 6: "Any railroad company organized or existing under the laws of this State" may "merge or . . . consolidate with any other railroad company or companies organized or existing under the laws of this or any other State or Territory or of the United States; provided that the lines of such companies shall not be competing, but shall be substantially continuous or connective, either by means of actual union of track or through the medium of any bridge, ferry, or line of railroad, leased."

Vermont. Stat. 1894, § 3975: "When a railroad in this State" is ordered sold by decree or judgment of a court, "any railroad company in this State, whose

With few exceptions these statutes permit corporations of the State to consolidate with corporations of other States owning connecting roads as well as with other domestic corporations.

The statutes, generally, contain provisions against the consolidation of competing or parallel railroads.

railroad connects with that ordered to be sold, may purchase the same, and upon acquiring title to said railroad, consolidate it with its own railroad and make it a part thereof."

Washington. Ballinger's Anno. Code 1897, §§ 4303, 4304: "Any railroad corporation chartered by or organized under the laws of the State, or of any State or Territory, or under the laws of the United States . . . may consolidate . . . with any other railroad corporation, whether within or without the State, when such other railroad does not own any competing line."

West Virginia. Code 1899, ch. 54, § 53 (as amended by acts 1901, ch. 108):

1. "No railroad corporation, owning or operating a railroad wholly or in part within this State, shall consolidate its capital stock with any other railroad corporation owning a parallel . . . line, . . . but any such railroad corporation whose line of railroad is made, or is in process of construction," may consolidate with "any other corporation of this or of an adjoining State, owning or operating a line of railroad . . . wholly or partly within this or an adjoining State, and connected directly, or by means of an intervening railroad or railroads, in order to make a continuous line of railroad to be run and operated without change of cars, break of bulk or exchange of passengers or freight."

2. "It shall be lawful for any railroad company created under the laws of this State, or of this and any other State or States, to consolidate with any railroad or railroads in this State or other States."

3. "Where two or more railroad companies have been heretofore incorporated under, and by virtue of the laws of this State, for the construction of two or more lines of railroad, which have been located or surveyed along the same line between any points and places, . . . the Boards of Directors of said corporations" may "consolidate the capital stock of their respective companies, or . . . consolidate different interests in the same road."

Wisconsin. Stat. 1898, § 1833 (as amended by Laws 1899, ch. 191): "Any railroad corporation organized and existing under the laws of the Territory or State of Wisconsin, or existing by consolidation of different railway companies under said laws and the laws of any other Territory or Territories, State or States, may consolidate . . . with any other railroad corporation whether within or without the State, when their respective railroads can be lawfully connected and operated together to constitute one continuous main line, with or without branches."

Wyoming. Rev. Stat 1899, § 3202: "Whenever a line of railroad of any railroad company in this State, or any portion of said line, has been constructed so as to connect with any two or more of such roads," said companies may consolidate.

Ib. § 3206: "Any company owning or operating a railroad within this State may extend the same into any other State or Territory, and may . . . consolidate with any other railroad or railroads in such other State or Territory, or with any other railroad in this State, and may operate the same."

§ 23. **What Business Corporations may consolidate — Statutory Provisions.**— While nearly all the States have general consolidation statutes applicable to railroad corporations, less than one-half have enacted laws authorizing the consolidation of other corporations. The statutes which have been enacted generally limit the right of consolidation to corporations of a particular kind e.g. mining or manufacturing companies, or to corporations organized for the purpose of carrying on business of the same or similar nature, and a few of the statutes require that such business shall be carried on in the same locality.¹

¹ In *Alabama* "any two or more mining, quarrying, or manufacturing corporations may unite and consolidate." (Ala. Civil Code, § 1147.)

In *California* corporations organized for "mining purposes" may consolidate. (Cal. Civil Code 1886, § 361.)

In *Colorado* "any corporations existing for any of the purposes enumerated in this [general] act" may consolidate. (Colo. Gen'l. Stat. 1891, § 628.)

In *Connecticut* corporations "carrying on business of the same or a similar nature may merge or consolidate." (Conn. Public Acts 1901, ch. 157.)

In *Delaware* "any two or more corporations organized . . . for the purpose of carrying on any business of the same or similar nature" may consolidate. (Del. Gen'l. Corp. Law 1899, § 54.)

In *Illinois* the consolidation act provides that it shall apply only "to corporations of the same kind and engaged in the same general business and carrying on their business in the same vicinity and that no more than two corporations now existing shall be consolidated into one, under its provisions." (Ill. Rev. Stat. 1895, ch. 31, §§ 50, 52.)

In *Kentucky* "any two or more corporations organized under the provisions of this chapter [general] or the laws of this State may consolidate into a single corporation." (Ky. Gen'l. Stat. 1894, § 555).

In *Louisiana* "any two business and manufacturing companies now existing under general or special law, whose objects and business are, in general, of the same nature," may amalgamate. (La. Act of Dec. 12, 1874.)

In *Maryland* consolidation may be effected when the "corporations have been originally incorporated in whole or in part for the same purpose." (Md. Gen'l. Laws 1888, ch. 23, § 39.)

In *Michigan* a statute has been enacted authorizing the consolidation of street railway, electric, and gas light companies or any two thereof. (Mich. Laws of 1899, Act No. 128.)

In *Missouri* "any two corporations now existing . . . whose objects and business are in general of the same nature may amalgamate," but the statute applies "only to corporations organized or created solely for manufacturing purposes." (Mo. Rev. Stat. 1889, § 2786.)

In *Montana* "it is lawful for two or more companies formed . . . for mining purposes, which own or possess, mining claims or lands adjoining each other, or lying in the same vicinity, to consolidate." (Mon. Civil Code § 527.)

In *Nevada* "all and any corporations heretofore or hereafter formed in the State of Nevada or under its laws . . . shall have the power and right to consolidate . . . with any other then existent corporation or corporations in the State of Nevada or of any State or

§ 24. Power of Legislature to withdraw or limit Right to consolidate — (A) In Absence of Reserved Power. — It has been held that a grant of power to consolidate, in the charter of a corporation, constitutes a contract between the corporation and the State and that, in the absence of a reserved right to amend or repeal the charter, such power cannot be withdrawn or limited by subsequent legislation.¹ On the other hand such provisions in charters have been held to fall within the class of grants which, as observed by Mr. Justice Peckham in *Bank of Commerce v. Tennessee*,² “do not partake of the nature of a contract, which cannot for that reason be in any respect altered or the power recalled by subsequent legislation. When no act is done under the provision and no vested right is acquired prior to the time when it was repealed, the provision may be validly recalled, without thereby impairing the obligation.”³

It seems, therefore, according to the weight of authority, that the power granted to a corporation to consolidate is a

Territory of the United States of America.” (Nev. Gen'l. Stat. § 1075.)

In *New Jersey* “any two or more corporations organized or to be organized under any law or laws of this State for the purpose of carrying on any kind of business of the same or a similar nature may merge or consolidate,” but the provisions of the act do not apply to railroad, insurance (except title insurance), banking, turnpike, or canal companies nor to savings banks or other corporations intended to derive profits from the loan or use of money. (N. J. Corporation Act of 1896, §§ 104–109.)

In *New York* “any two or more corporations organized under the laws of this State for the purpose of carrying on any kind of business of the same or similar nature, which a corporation organized under this Chapter might carry on, may consolidate.” N. Y. Business Corporation Law (as amended to 1899) §§ 8–12.

In *Texas* corporations created for benevolent, charitable, educational, and

other similar purposes may consolidate by filing new charter. (Texas Rev. Stat. 1895, Art. 651, subdiv. 9).

In *Utah* “corporations of the same kind engaged in the same general business in the same vicinity” may consolidate. (Utah Rev. Stat. 1898, § 340).

¹ *Zimmer v. State*, 30 Ark. 680 (1875): “The power here given the company to form a union or consolidation with any other company was a right secured by the inviolability of a contract between the State and company, which could not be withdrawn or to any extent impaired by the State.”

² *Bank of Commerce v. Tennessee*, 163 U. S. 425 (1896), (16 Sup. Ct. Rep. 1113).

³ *Galveston, etc. R. Co. v. Texas*, 170 U. S. 226 (1898), (18 Sup. Ct. Rep. 603); *Adams v. Yazoo, etc. R. Co.*, 77 Miss. 194 (1899), (24 So. Rep. 200), affirmed *sub nom. Yazoo, etc. R. Co., v. Adams*, 180 U. S. 1 (1901), (21 Sup. Ct. Rep. 240). See also *Pearrell v. Great Northern R. Co.*, 161 U. S. 646 (1896), (16 Sup. Ct. Rep. 705).

mere *license*, not resting in contract, which may be rendered inoperative by legislation enacted at any time before the corporation avails itself of the privilege granted; and that such power exists in the legislature independent of any right reserved to amend or repeal the charter or of its police power.

If power to consolidate, while unexecuted, is not a contract within the protection of the decision in the Dartmouth College case, *a fortiori* it is not, in itself, a vested right which the legislature may not take away or impair. Arrangements for consolidation made and carried into effect create vested rights, but the bare power to consolidate is not of that nature.¹

¹ In *Pearsall v. Great Northern R. Co.*, 161 U. S. 672 (1896), (16 Sup. Ct. Rep. 705), Mr. Justice Brown discusses the questions suggested in the text, although in that case the statutes forbidding consolidation expressly protected "vested rights": "It is possible that, if this arrangement had been actually made and carried into effect, before the acts forbidding the consolidation of parallel or competing lines had been passed, the rights of the parties thereto would have become vested, and could not be impaired by any subsequent act of the legislature. But the real question before us is whether a bare unexecuted power to consolidate with other corporations, a power which, if it exists as claimed by the defendant, would authorize it to absorb by successive and gradual accretions the entire railway system of the country, is not, so long as it remains unexecuted, within the control of and subject to revocation by the legislature, at least, so far as it applies to parallel or competing lines. A vested right is defined by Fearn in his work upon *Contingent Remainders*, as 'an immediate fixed right of present or future enjoyment'; and by Chancellor Kent as, 'an immediate right of present enjoyment, or a present fixed right of future enjoyment.' 4 Kent. Com. 202. It is said by Mr. Justice Cooley that 'rights are vested, in contradistinction to being expectant or contingent. They are

vested when the right to enjoy, present or prospective, has become the property of some particular person or persons as a present interest. They are expectant when they depend upon the continued existence of the present condition of things until the happening of some future event. They are contingent, when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting.' *Principles of Const. Law*, 332. As applied to railroad corporations, it may reasonably be contended that the term extends to all rights of property acquired by executed contracts, as well as to all such rights as are necessary to the full and complete enjoyment of the original grant, or of property legally acquired subsequent to such grant. If, for example, the legislature should authorize the construction of a certain railroad, and by a subsequent act should take away the power to raise funds for the construction of the road in the usual manner by a mortgage, or the power to purchase rolling stock or equipment, such acts might perhaps be treated as so far destructive of the original grant as to render it valueless, although there might in neither case be an express repeal of any of its provisions. *Sala v. New Orleans*, 2 Woods 188 (1875). But where the charter authorizes the company in sweeping terms to do certain things which are unnecessary

General power to consolidate authorizes the consolidation of competing lines of railroad and constitutional and statutory provisions against consolidation in that form furnish the most common illustration of limitations imposed upon existing rights of consolidation.¹

§ 25. **Power of Legislature to withdraw or limit Right to consolidate — (B) In Exercise of Reserved Power.** — Whatever doubt may exist as to the constitutional authority of the legislature to withdraw an existing unexecuted right to consolidate in the absence of a power reserved to amend or repeal the law granting the right, when such reservation has been made, legislative authority to limit or take away the right is unquestionable.²

The reservation of power to alter or amend a charter, however, gives the legislature no power to impair vested rights of property — except, of course, for a public use upon just compensation — and a provision in an act forbidding the consolidation of competing railroads that it shall not affect vested rights is merely declaratory.³ A stipulation in an act repealing the power to consolidate theretofore granted to certain corporations, that such repeal shall not “affect or impair any act done or right accruing, accrued, or acquired” before a certain date does not affect consolidation proceedings commenced, but not concluded, before such time, and they may be completed entirely unaffected by the repealing act.⁴

§ 26. **Power of Legislature to withdraw or limit Right to Consolidate — (C) In Exercise of Police Power.** — There is another

to the main object of the grant, and not directly or immediately within the contemplation of the parties thereto, the power so conferred, so long as it is unexecuted, is within the control of the legislature and may be treated as a license, and may be revoked, if a possible exercise of such power is found to conflict with the interests of the public.”

See also *Louisville, etc. R. Co. v. Kentucky*, 161 U. S. 677 (1896), (16 Sup. Ct. Rep. 714).

¹ See *post*, § 32, “*Constitutional and Statutory Provisions against Consolidation of Competing Railroads.*”

² *Pearsall v. Great Northern R. Co.*, 161 U. S. 672 (1896), (16 Sup. Ct. Rep. 705); *Louisville, etc. R. Co. v. Kentucky*, 161 U. S. 695 (1896), (16 Sup. Ct. Rep. 714).

³ *Pearsall v. Great Northern R. Co.*, 161 U. S. 672 (1896), (16 Sup. Ct. Rep. 705). See *ante*, § 24, “*Power of Legislature to withdraw or limit Right to consolidate — In Absence of Reserved Power.*”

⁴ *Cameron v. New York, etc. Water Co.*, 133 N. Y. 336 (1892), (31 N. E. Rep. 104).

principle applicable to railroad companies and other corporations assuming the performance of public duties upon which the legislature may withdraw the power of consolidating, if the exercise of such power may conflict with the public interests, and that is the principle that the State has the right to guard the welfare of its citizens — the police power. In the exercise of its police power the State may prohibit the consolidation of competing railroads, although their charters authorize consolidation, provided the authority has not been exercised and vested rights acquired. It is also immaterial whether a grant of power to consolidate is a contract or a license or whether a right to amend or repeal is reserved, for the constitutional prohibition of legislation impairing the obligation of contracts does not exempt a corporation from the exercise of the police power of the State.

In *Louisville, etc. R. Co. v. Kentucky*¹ Mr. Justice Brown said: "Under the police power the people, in their sovereign capacity, or the legislature, as their representative, may deal with the charter of a railway corporation, so far as is necessary for the protection of the lives, health, and safety of its passengers or the public, or for the security of property or the conservation of the public interests, provided, of course, that no vested rights are thereby impaired. In other words, the legislature may not destroy vested rights, whether they are expressly prohibited from doing so or not, but otherwise may legislate with respect to corporations, whether expressly permitted to do so or not. While the police power has been most frequently exercised with respect to matters which concern the public health, safety, or morals, we have frequently held that corporations engaged in public services are subject to legislative control, so far as it becomes necessary for the protection of the public interests."

¹ *Louisville, etc. R. Co. v. Kentucky*, 161 U. S. 695 (1896), (16 Sup. Ct. Rep. 714). See also *Pearsall v. Great Northern R. Co.*, 161 U. S. 672 (1896), (16 Sup. Ct. Rep. 705); *Gibbs v. Consolidated Gas Co.*, 130 U. S. 407 (1889), (9 Sup. Ct. Rep. 553).

III. *Construction of Statutes authorizing Consolidation.*

§ 27. **General Rules of Construction.** — The Chancellor of New Jersey once intimated¹ that acts authorizing the consolidation of corporations relate rather to the transfer of existing rights than to the creation of new ones and are not subject to the strict rules of construction applicable to original grants of corporate powers. But the Supreme Court in reversing the decree of the Chancellor² laid down the rule that a grant from the State “will not be deduced from the words of a statute, except when it contains language not susceptible of any other rational construction.” The correct rule, in determining the existence of authority to consolidate, is that a statute must receive a strict, but not unreasonable, construction.

The question whether authority to consolidate must be expressly conferred upon each consolidating corporation has occasioned a division of judicial authority. On the one hand, it has been held that where power is given by statute to one corporation to unite with *any other*, whatever other corporation it selects and agrees with for the union has, by implication, power to unite with it, although such other corporation is not named in the act and has not, otherwise, power to consolidate.³ The reason given for this conclusion is that

¹ *Black v. Delaware, etc. Canal Co.*, 22 N. J. Eq. 402 (1871): “This act can hardly be considered a grant from the State, or to fall within the rule requiring strict construction in all such grants. The State here parts with no property and creates no new privilege or franchise that can affect the public. It simply permits a new arrangement or contract as to privileges and franchises already granted. It enlarges none.”

The contract under consideration in this case was a lease, but the statute also authorized consolidation.

² *Black v. Delaware, etc. Canal Co.*, 24 N. J. Eq. 455 (1873).

³ *Matter of Prospect Park, etc. R. Co.*, 67 N. Y. 377 (1876): “The act . . . gave power to one of the cor-

porations, which now together form the corporation which is the petitioner in this case, to consolidate with any other like corporation. The point of the appellants, that no power to consolidate is given to the other of those corporations, is without effect. Power is given by statute to one corporation to form a consolidation with *any other*. It cannot form a consolidation unless it finds another with which to unite and which is capable of union with it; hence whatever other company it selects for a union, and finds willing to join it, that other company, though not named in the statute, gets power from the statute to unite with that company which the statute names.”

the power granted to one corporation to consolidate necessarily involves the same power in the other company and so operates impliedly as an enlargement of its charter.¹ On the other hand, it has been held that *all* the constituent corporations must have the power to consolidate in order to effect a valid consolidation — that power to consolidate with any other corporation means, reasonably, any other corporation having power to consolidate.² The latter conclusion is more in accordance with the rule of strict, yet reasonable, construction.

It has also been held, upon a principle which seems at least doubtful, that the fact that the right of one company to consolidate is limited under its charter does not deprive it of the right to consolidate under the general laws of the State.³

¹ New York, etc. R. Co. v. New York, etc. R. Co., 52 Conn. 274 (1884). See also Knoxville v. Knoxville, etc. R. Co., 22 Fed. 763 (1884).

² In Louisville, etc. R. Co. v. Kentucky, 161 U. S. 691 (1896), (16 Sup. Ct. Rep. 714), Mr. Justice Brown said: "Besides this, however, in order to support the proposed consolidation of these two systems, the parties are bound to show, not only that the L. & N. Co. was competent to buy, but that the Chesapeake Co. was also vested with power to sell. To make a valid contract it is necessary to show that both parties are competent to enter into the proposed stipulations. It is a fundamental principle in the law of contracts that, to make a valid agreement, there must be a meeting of minds, and, obviously, if there be a disability on the part of either party to enter into the proposed contract there can be no valid agreement."

See also St. Louis, etc. R. Co. v. Terre Haute R. Co., 145 U. S. 393 (1892), (12 Sup. Ct. Rep. 953).

In Morrell v. Smith County, 89 Tex. 529 (1896), (36 S. W. Rep. 56), it was held that authority given a railroad company by its charter, to consolidate with any other company, does not confer authority upon another company to

consolidate with it: and the power is, in effect, limited to a union with another company having like power. In this case the Court declined to follow the rule laid down in Matter of Prospect Park, etc. R. Co., 67 N. Y. 377 (1876). See also East Line, etc. R. Co. v. Rushing, 69 Tex. 306 (1887), (6 S. W. Rep. 834); East Line, etc. R. Co. v. State, 75 Tex. 434 (1889), (12 S. W. Rep. 690), and dissenting opinion in Boston, etc. R. Co. v. New York, etc. R. Co., 13 R. I. 275 (1881). That the same principle is applicable in the case of interstate consolidations see American Loan, etc. Co. v. Minnesota, etc. R. Co., 157 Ill. 641 (1895), (42 N. E. Rep. 153); Continental Trust Co. v. Toledo, etc. R. Co., 82 Fed. 642 (1897).

In England it has been said that an agreement cannot be made by which one railroad company shall turn over its railway to be worked by another company unless the latter possesses, under its charter, power to receive and work it. Winch v. Birkenhead, etc. R. Co., 16 Jur. 1035 (1835).

³ Warren v. Kankakee County, 1 Monthly West. Jur. 556 (1875), (Fed. Cas. No. 17205) (per Blodgett, J.): "The right of the company to consolidate, under its charter, seemed limited, but that did not take away the right

§ 28. **Construction of Particular Statutory Provisions.**—An act authorizing the consolidation of two corporations authorizes, by reasonable intendment, the consolidation of more than two;¹ and it has been held that a statute providing for the consolidation of corporations, but upon the condition “that no more than two corporations now existing shall be consolidated into one under the provisions hereof,” authorized the consolidation of more than two corporations if only two of them were in existence at the time of the passage of the act.²

A consolidation act authorizing the consolidation of “railroad companies” has been held to include *street* railroad companies.³ When the words “any other railroad” or similar words are used in a charter or statute authorizing consolidation, without restricting them to domestic corporations, they include foreign railroad companies as well.⁴

A statute providing that, in case of consolidation, the consolidated corporation shall be liable for the debts of the constituent companies does not, in itself, authorize consolidation.⁵

A grant of power to connect or unite with another road refers merely to a physical connection of the tracks and does not authorize any union of the franchises of the two corporations or their consolidation. Power to consolidate cannot be inferred from any such indefinite language as “to unite and connect with such road.”⁶

from the company to consolidate under the general law of the State by complying with all the provisions of the law.”

¹ *People v. Rice*, 66 Hun (N. Y.) 130 (1892), (21 N. Y. Supp. 48), *affirmed* 138 N. Y. 614 (1893), (33 N. E. Rep. 1083).

² *Barrows v. People's Gas Light, etc. Co.*, 75 Fed. 794 (1895).

³ *Matter of Washington St., etc. R. Co.*, 115 N. Y. 442 (1889), (22 N. E. Rep. 356), *affirming* 52 Hun 311 (1889), (5 N. Y. Supp. 355). See, however, *Philadelphia v. Thirteenth St., etc. Co.* (Pa.), 1 Leg. Gaz. Rep. 165 (1871).

⁴ *Pittsburg, etc. R. Co. v. Keokuk, etc. Bridge Co.*, 131 U. S. 371 (1891),

(9 Sup. Ct. Rep. 770); *St. Louis, etc. R. Co. v. Terre Haute R. Co.*, 145 U. S. 403 (1892), (12 Sup. Ct. Rep. 953); *Boston, etc. R. Co. v. Boston, etc. R. Co.*, 65 N. H. 393 (1888), (23 Atl. Rep. 529).

Contra, *Black v. Delaware, etc. R. Co.*, 24 N. J. Eq. 455 (1873).

⁵ *Kavanaugh v. Omaha Life Ass'n.*, 84 Fed. 295 (1897).

⁶ *Louisville, etc. R. Co. v. Kentucky*, 161 U. S. 684 (1896), (16 Sup. Ct. Rep. 714): “By the act . . . the company was given power to *unite* their road with any other road connecting therewith upon such conditions as the two companies might agree upon. As we have

While the authorities are not uniform upon the question whether a grant of power to consolidate with a railroad company gives power to sell to that company¹ the converse of

frequently held that a power to connect or unite with another road refers merely to a physical connection of the tracks and does not authorize the purchase or even the lease of such road, or any union of their franchises, it is evident that this act is no authority for the proposed consolidation. . . . The important power to purchase or consolidate with another line cannot be inferred from any such indefinite language as "to unite or connect with such road."

See also *Atchison, etc. R. Co. v. Denver, etc. R. Co.*, 110 U. S. 667 (1884), (4 Sup. Ct. Rep. 185); *Pennsylvania Co. v. St. Louis, etc. R. Co.*, 118 U. S. 290 (1886), (6 Sup. Ct. Rep. 1094); *Oregon, R. etc. Co. v. Oregonian R. Co.*, 130 U. S. 1 (1889), (9 Sup. Ct. Rep. 409); *St. Louis, etc. R. Co. v. Terre Haute R. Co.*, 145 U. S. 393 (1892), (12 Sup. Ct. Rep. 953); *Morrell v. Smith County*, 89 Tex. 529 (1896), (36 S. W. Rep. 56).

¹ In *Branch v. Jesup*, 106 U. S. 478 (1882), (1 Sup. Ct. Rep. 495), the Supreme Court of the United States said: "As a general rule, it is true, a railroad company, with only the ordinary powers to construct and operate its road, cannot dispose of it to another company. Legislative aid is necessary to that end. But this company had, by its charter, express power to incorporate its stock with the stock of any other company. This power has an enlarging effect upon the ordinary power to sell and dispose of property belonging to the company. Generally the power to sell and dispose has reference only to transactions in the ordinary course of business incident to a railroad company, and does not extend to the sale of the railroad itself, or of the franchise connected therewith. Outlying lands, not needed for railroad uses, may be sold. Machinery and other personal property may be sold. But

the road and franchises are generally inalienable; and they are so not only because they are acquired by legislative grant, or in the exercise of special authority given, for the specific purposes of the incorporating act, but because they are essential to the fulfilment of those purposes; and it would be a dereliction of the duty owed by the corporation to the State and to the public to part with them. But where, as in this case, power is given to incorporate the capital stock with the stock of any other company, a very large addition is made to the ordinary powers granted to a company. In this country the creation and exercise of such a power is well understood. It contemplates not only the possible transfer of the railroad and its franchises to another company, but even the extinguishment of the corporation itself, and its absorption into a different organization. *The greater power of alienating or extinguishing all its franchises, including its own being and existence, contains the lesser power of alienating its road and the franchises incident thereto and necessary to its operation.*"

On the other hand, in the case of *Tippecanoe County v. Lafayette, etc. R. Co.*, 50 Ind. 110 (1875), the Supreme Court of Indiana said: "That act is 'to authorize railroad companies to consolidate their stock with the stock of other railroad companies in this or in an adjoining State, and to connect their roads with the roads of said companies.' The title nowhere mentions a lease or a sale. Indeed, the words to connect their roads with the roads of other companies, would seem to exclude such a conclusion. To connect one road with another does not fairly mean to lease or sell it to another." See also *East Line, etc. R. Co. v. State* 75 Tex. 434 (1889), (12 S. W. Rep. 690).

the proposition was adopted in reference to an Illinois statute, that power to purchase, in the form there granted, gave power to consolidate. "While the statute denominates the transaction a purchase, the thing authorized to be done, and what was done in the case, was in fact a consolidation."¹

§ 29. **Construction of Statutes authorizing Consolidation of Railroads — Connecting or Continuous Lines.** — As already shown² the consolidation statutes of a majority of the States provide that railroad companies may consolidate with other corporations owning railroads which form a continuous or connecting line with their own, and the effect of such provisions is, manifestly, to limit the right of consolidation to that class of railroads. Accordingly, to bring railroad corporations within the provisions of such statutes it must be shown that there is such a physical connection between their roads as to permit the cars of one road to pass to the other, uninterruptedly, without the transshipment of passengers or freight.³

It is sufficient, however, that the connected roads form a continuous line, and it is not necessary that the road of one corporation should be an extension from either terminus of the other.⁴

Whether the required physical connection may be formed by means of leased lines has been the subject of extensive judicial consideration. The weight of authority supports the view that consolidation, under the statutes referred to, can take place only when the railroads *owned* by the corporations proposing to consolidate form continuous lines.⁵ In constru-

¹ *Chicago, etc. R. Co. v. Ashling*, 56 Ill. App. 327 (1894); *Continental Trust Co. v. Toledo, etc. R. Co.*, 82 Fed. 642 (1897).

² *Ante*, § 22: "*What Railroads may consolidate — Statutory Provisions.*"

³ *Central R. Co. v. Macon*, 43 Ga. 646 (1871); *State v. Vanderbilt*, 37 Ohio St. 590 (1889); *State v. Atchison, etc. R. Co.*, 24 Neb. 143 (1888), (38 N. W. Rep. 43, 8 Am. St. Rep. 164) (lease).

Under the Ohio statute it has been

held that two non-parallel railroads may be deemed to "form a continuous line" when their tracks are connected, not directly but by those of a "union" terminal company. *Burke v. Cleveland, etc. R. Co.*, 22 Weekly Law Bull. (Ohio) 11 (1889).

⁴ *Hancock v. Louisville, etc. R. Co.*, 145 U. S. 409 (1892), (12 Sup. Ct. Rep. 969). See also *Wallace v. Long Island R. Co.*, 12 Hun (N. Y.) 460 (1877).

⁵ *State v. Vanderbilt*, 37 Ohio St. 590 (1882). See also *East Line, etc*

ing a statute authorizing consolidation "when the lines of road of any railroad companies . . . admit the passage of burden or passenger cars over any two or more of such roads continuously, without break or interruption," the Supreme Court of Ohio in *State v. Vanderbilt*¹ said: "It is plain that the connection is formed and only exists by the lines of the lessors, and that as to the lessee companies there is no connection. . . . Plainly, as it seems to us, there is no consolidation of the lessor companies; and it is equally clear that the right to consolidate, based on the consolidating company's ownership of the leased roads, is wholly untenable."

Statutes authorizing the consolidation of connecting lines

R. Co. v. State, 75 Tex. 434 (1889), (12 S. W. Rep. 690); *State v. Atchison, etc. R. Co.*, 24 Neb. 143 (1888), (38 N. W. Rep. 43, 8 Am. St. Rep. 164) (lease); *Smith v. Reading City Pass. R. Co.*, 13 Pa. Co. Ct. Rep. 49 (1893); *Hampe v. Mt. Oliver L. R. Co.*, 24 Pitts. Leg. J. (n. s.) 330 (1894) (lease).

Contra, *Black v. Delaware, etc. R. Co.*, 22 N. J. Eq. 130 (1871), where the Chancellor held that where an act authorized a railroad company to lease to or consolidate with any other corporation whose works should form continuous or connecting lines with its own, a lease was authorized to a railroad company whose lines were connected by an intervening road. In so holding, the Chancellor said that the works of the United Companies formed both connected and continuous lines with the works of the Pennsylvania Railroad Company; that two railroads form a continuous line when their tracks and rails join, so that a train may pass from the rails and tracks of one directly upon those of the other — they form a connected line when this is done by means of an intervening or connecting road. This doctrine was, however, doubted by the Supreme Court of New Jersey when the case came to the court (24 N. J. Eq. 455 (1873)): "If it is held that the lease may be made with any road in or out of the State, with which the

united companies are connected by means of an intervening road or canal, they may unite with almost any road in the whole country, and it may be with roads abroad if they were connected by means of steamships. There should be a very clear expression of power so extensive and extraordinary as this."

See also *Hervey v. Illinois Midland Co.*, 28 Fed. 172 (1884) (case of sale), where the Court said: "It is quite true that the Peoria, Atlanta & Decatur Railroad Company was not authorized to purchase *any* railroad in the State; but I incline to think that its charter authorized the purchase of any road which, from its location, would be fairly deemed a continuation of the main line of the purchasing company. The effect of the agreement between the three companies was to establish a continuous line from Peoria, via Decatur to Terre Haute. That small parts of that line were and are owned by other companies, does not affect the substance of the transaction whereby, with the knowledge and approval of the great body of the bondholders and stockholders of the three roads, they were operated as one line, under a common management. Also *Cleveland, etc. R. Co. v. Erie*, 27 Pa. St. 380 (1856).

¹ *State v. Vanderbilt*, 37 Ohio St. 590 (1882).

do not establish exceptions to statutory provisions against the consolidation of parallel and competing railroads. The lines of two railroad companies which are, in their general features, parallel and competing cannot be connected for the carriage of freight and passengers over both "continuously"; and hence such companies cannot become consolidated into one corporation under the Ohio statute above referred to.¹

Under another Ohio statute authorizing the consolidation of domestic railroad corporations owning roads running to the boundary line of the State, with similar corporations of an adjoining State, owning roads forming a continuous line therewith, it was held that an Ohio, an Indiana, and an *Illinois* corporation might consolidate so as to form a *de facto* consolidated corporation upon the principle that the last two companies *might* have been consolidated and have become an Indiana corporation — a corporation of an adjoining State to that of the Ohio company — with which it might have consolidated.²

¹ *State v. Vanderbilt*, 37 Ohio St. 590 (1882): "The Cleveland, Cincinnati and Indianapolis Ry. and the Cincinnati, Hamilton and Dayton R. R., with their leased lines, constitute two great arteries of trade, both commencing on the Ohio River at Cincinnati, meeting at Dayton, and extending thence to Lake Erie, one terminating at Cleveland and the other at Toledo. The Attorney-General says, and the record supports the statement, that these roads are "for sixty miles lying parallel and near to each other." That they are, indeed, in the largest sense, parallel and competing roads, seems to be beyond dispute, and it may be fairly inferred from the record that a leading object in making the consolidation was to destroy that competition. That being true, the lines of these roads are not, in my judgment, 'so constructed as to admit the passage of burden or passenger cars over two or more of such roads continuously,' within the proper meaning of section 3379. That the mere physical ability to pass cars from one road to

the other satisfies the statute, is a construction which is wholly inadmissible, for the provision requiring such connection would be without meaning. In imposing that restriction upon consolidation, the legislature intended, not merely that the physical fact should exist, but that such consolidation should only be made for the very passing of freight and passengers over both lines, or some material parts thereof, not necessarily in a direct or straight line, but continuously."

See also *Hafer v. Cincinnati, etc. R. Co.*, 29 Weekly Law Bull. (Ohio) 68 (1896), 4 S. C. & P. (Ohio) 487.

² *Continental Trust Co. v. Toledo, etc. R. Co.*, 82 Fed. 653 (1897). The Court said: "It cannot be denied, however, that under the Illinois statute, the Illinois and Indiana corporations might have united, and that then the consolidated corporation, being a corporation of Indiana, could be consolidated with the Ohio corporation; and we should have had just what the corporation under consideration purports to be, to

It is not necessary in order to bring railroad companies within the provisions of statutes authorizing the consolidation of continuous or connecting lines that their lines should be entirely constructed if, when constructed, they will form continuous or connecting lines.¹

The legal principles governing, and cases illustrating, the consolidation of connecting lines are equally applicable to the purchase or lease of such lines.

§ 30. Construction of Statutes authorizing Consolidation of Business Corporations. — Statutes authorizing the consolidation of mining, manufacturing, and business corporations, generally, have already been briefly reviewed.² These statutes, as a rule, are limited in their application to corporations engaged in business of a similar nature and, sometimes, to those carrying on business in the same locality. Under such a statute authorizing the consolidation of corporations of the same nature covering the same territory it was held that two water companies organized for the purpose of supplying water to the same village might lawfully consolidate.³

It has been said, however, that a consolidation act permitting the amalgamation of "two business or manufacturing companies" whose "objects and business are of the same nature" does not apply to or include corporations endowed with peculiar and exclusive franchises and privileges.⁴ It was also held that the same statute did not permit the con-

wit: a legally consolidated corporation of Ohio, Indiana, and Illinois. It is obvious that, if such a corporation could have been legally formed, the mere mistake in the mode by which the union was brought about (if it was a mistake, which I do not decide) does not prevent the corporation from being a *de facto* corporation, under the principles stated at length above."

¹ *Livingston County v. Portsmouth First Nat. Bank*, 128 U. S. 102 (1888), (9 Sup. Ct. Rep. 18): "The statute applied to the consolidation, although no road had yet been constructed." See also *Washburn v. Cass County*, 3 Dill. (U. S.) 251 (1875). Compare, however, *Clarke v. Omaha, etc. R. Co.*, 4 Neb.

459 (1876), where a general corporation law of Nebraska which gave no power to consolidate "until the roads shall have been constructed" was under consideration. See also *Venner v. Atchison, etc. R. Co.*, 28 Fed. 585 (1886).

² *Ante*, § 23: "What Business Corporations may consolidate — Statutory Provisions."

³ *Cameron v. New York, etc. Water Co.*, 62 Hun (N. Y.) 269 (1891), affirmed in 133 N. Y. 336 (1892), (31 N. E. Rep. 104).

⁴ *New Orleans Gas Light Co. v. Louisiana Light, etc. Co.*, 11 Fed. 277 (1882).

consolidation of two companies the life of one of which was to terminate at the commencement of the life of the other.¹ The business of a gas company and that of an electric light company are of the same general character within the meaning of a statute authorizing the consolidation of corporations of the same or a similar nature.² An electric light company is a "manufacturing corporation" within the meaning of an act providing that "two or more mining, quarrying or manufacturing corporations may unite and amalgamate."³

CHAPTER III.

CONSTITUTIONAL AND STATUTORY RESTRAINTS UPON CONSOLIDATION.

- § 31. Public Policy regarding Consolidation of Competing Railroads.
- § 32. Constitutional and Statutory Provisions against Consolidation of Competing Railroads.
- § 33. Construction of Prohibitions — (A) Meaning of Term "Consolidation."
- § 34. Construction of Prohibitions — (B) Whether a Lease amounts to Consolidation.
- § 35. Construction of Prohibitions — (C) Arrangements amounting to Consolidation.
- § 36. Construction of Prohibitions — (D) Control of Competing Railroads by Holding Corporation.
- § 37. Construction of Prohibitions — (E) What are Competing or Parallel Railroads.
- § 38. Prohibition of Consolidation of Competing Railroads not a Regulation of Interstate Commerce.
- § 39. Constitutional Prohibitions against Consolidation of Competing Carrier Corporations other than Railroads.
- § 40. Enforcement of Provisions against Consolidation of Competing Lines.

§ 31. Public Policy regarding Consolidation of Competing Railroads. — It may be a serious economic question whether

¹ *New Orleans Gas Light Co. v. Louisiana Light, etc. Co.*, 11 Fed. 277 (1882). "manufacturing" corporation within the meaning of a taxation statute. *People v. Wemple*, 129 N. Y. 543 (1892), (29 N. E. Rep. 808). Precisely the opposite was, however, held in *Commonwealth v. Northern El. Light, etc. Co.*, 145 Pa. St. 105 (1891), (22 Atl. Rep. 839).

² *People v. Rice*, 138 N. Y. 151 (1893), (33 N. E. Rep. 846).

³ *Beggs v. Ed. El. Light, etc. Co.*, 96 Ala. 295 (1891), (11 So. Rep. 381, 38 Am. St. Rep. 94). An electric light company has also been held to be a

the consolidation of competing railroad companies works, in the end, injury to the public. The increased capital may result in bringing the roads to a higher standing of efficacy ; the resulting economies in operation may permit the lowering of rates ; the possibility of disastrous rate wars is eliminated. On the other hand consolidation *may* produce an increase in rates, public facilities are placed in the hands of a single corporation, relieved from the obligations imposed by competition and rate wars do not always result disastrously to the *public*.

Whatever may be the merits of the question, however, it is not an open one from the popular point of view.¹ Public policy, as has been shown, favors the consolidation of connecting railroads for the purpose of establishing the through line, but is, uniformly, opposed to the consolidation of railroads which are, naturally, competitors for the business of the same territory.²

¹ *Pearsall v. Great Northern R. Co.*, 161 U. S. 676 (1896), (16 Sup. Ct. Rep. 705): "Whether the consolidation of competing lines will necessarily result in an increase of rates, or whether such consolidation has generally resulted in a detriment to the public, is beside the question. Whether it has that effect or not, it certainly puts it in the power of the consolidated corporation to give it that effect ; in short, puts the public at the mercy of the corporation. There is and has been, for the past three hundred years, both in England and in this country, a popular prejudice against monopolies in general, which has found expression in innumerable acts of legislation. We cannot say that such prejudice is not well founded. It is a matter upon which the legislature is entitled to pass judgment. At least there is sufficient doubt of the propriety of such monopolies to authorize the legislature, which may be presumed to represent the views of the public, to say that it will not tolerate them unless the power to establish them be conferred by clear and explicit language. While, in particular cases, two rail-

ways, by consolidating their interests under a single management, may have been able to so far reduce the expenses of administration as to give their customers the benefit of a lower tariff, the logical effect of all monopolies is an increase of price of the thing produced, whether it be merchandise or transportation. Owing to the greater speed and cheapness of the service performed by them, railways become necessarily monopolists of all traffic along their lines, but the general sentiment of the public declares that such monopolies must be limited to the necessities of the case, and rebels against an attempt of one road to control all traffic between terminal points, also connected by a competing line. There are, moreover, thought to be other dangers to the moral sense of the community, incident to such great aggregation of wealth which, though indirect, are even more insidious in their influence, and such as have awakened feelings of hostility which have not failed to find expression in legislative acts."

² *State v. Vanderbilt*, 37 Ohio St. 590 (1882): "The policy of the country

In many States statutes have been enacted prohibiting the consolidation of competing or parallel lines and, in others, the people have inserted such provisions in their fundamental laws. Other States indicate the same policy by failing to authorize consolidation at all.

Public sentiment, as so crystallized in statutes and constitutional provisions, is not of recent inception. As said by Mr. Justice Brown in *Louisville, etc. R. Co. v. Kentucky*:¹ "This restriction upon the unlimited power to consolidate with other roads is not, as the plaintiff in error suggests, called for by any new view of commercial policy, but by virtue of a settled policy which has obtained in Kentucky since 1858, in Minnesota since 1874, in Ohio since 1851, in New Hampshire since 1867, and by more recent enactments in some dozen other States — a policy which has not only found place in the statute law of such States as apprehended evil effects from such consolidations, but has been declared by the courts to be necessary to protect the public from the establishment of monopolies. Indeed the unanimity with which the States have legislated against the consolidation of competing

in general, indicated in constitutional and statutory provisions, has long been opposed to the consolidation of roads bearing such relation to each other [competing and parallel], and this strengthens the belief that these companies are not within the section in question. Consolidation for the transportation of freight and passengers continuously is a thing which the legislature might well desire to encourage, as it may be advantageous alike to the public and the companies; but corporations have power only as granted by the general assembly, and where companies situated as these are, being parallel and competing, claim that authority to consolidate has been granted to them, they must be able to point to words in the statute which admit of no other reasonable construction, for it will not be assumed that the lawmaking power has authorized the

creation of a monopoly so detrimental to the public interests." See also *Woodruff v. Erie R. Co.*, 93 N. Y. 615 (1883); *State v. Atchison, etc. R. Co.*, 24 Neb. 143 (1888), (38 N. W. Rep. 43, 8 Am. St. Rep. 164); *Central R., etc. Co. v. Collins*, 40 Ga. 582 (1869).

Another view as to the propriety of such legislation was, however, expressed by Lord Hatherley, then Vice Chancellor Wood, in *Hare v. Railway Co.*, 2 Johns. & H. 80 (1861): "I see nothing in the alleged injury to the public arising from the prevention of competition. . . . It is a mistaken notion that the public is benefited by putting two railway companies against each other till one is ruined, the result being at last to raise the fares to the highest possible standard."

¹ *Louisville, etc. R. Co. v. Kentucky*, 161 U. S. 698 (1896), (16 Sup. Ct. Rep. 714).

lines shows that it is not the result of local prejudice, but of a general sentiment, that such monopolies are reprehensible."

§ 32. **Constitutional and Statutory Provisions against Consolidation of Competing Railroads.**—Public policy as directed against the consolidation of competing railroad companies has manifested itself in the constitutional provisions and statutes printed or referred to in the footnote.¹ These con-

¹ *Arkansas*. Const. Art. XVII. § 4: "No railroad, canal, or other corporation, or the lessees, purchasers, or managers of any railroad, canal, or other corporation, shall consolidate the stock, property, or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control, any other railroad or canal corporation owning or having under its control a parallel or competing line, nor shall any officer of such railroad or canal corporation act as an officer of any other railroad or canal corporation owning or having control of a parallel or competing line; and the question whether railroads or canals are parallel or competing lines shall, when demanded by the party complainant, be decided by a jury as in other civil issues."

Colorado. Const. XV. § 5: "No railroad corporation, or the lessees or managers thereof, shall consolidate its stock, property, or franchises with any other railroad corporation owning or having under its control a parallel or competing line."

Georgia. Const. Art. IV. § 2, par. 4: "The General Assembly of this State shall have no power to authorize any corporation to buy shares or stock in any other corporation in this State or elsewhere, or to make any contract or agreement whatever with any such corporation which may have the effect to defeat or lessen competition in their respective businesses, or to encourage monopoly; and all such contracts and agreements shall be illegal and void."

Illinois. Const. Art. XI. § 11: "No railroad corporation shall consolidate its stock, property, or franchises with any

other railroad corporation owning a parallel or competing line; and in no case shall any consolidation take place, except upon public notice given of at least sixty days, to all stockholders, in such manner as may be provided by law. A majority of the directors of any railroad corporation, now incorporated or hereafter to be incorporated by the laws of this State, shall be citizens and residents of this State."

Kentucky. Const. § 201: "No railroad, telegraph, telephone, bridge, or common carrier company shall consolidate its capital stock, franchises, or property, or pool its earnings, in whole or in part, with any other railroad, telegraph, telephone, bridge, or common carrier company owning a parallel or competing line or structure, or acquire by purchase, lease, or otherwise, any parallel or competing line or structure, or operate the same."

Michigan. Const. Art. XIX. A, § 2: "No railroad corporation shall consolidate its stock, property, or franchises with any other railroad corporation owning a parallel or competing line; and in no case shall any consolidation take place except upon public notice of at least sixty days given to all stockholders, in such manner as shall be provided by law."

Missouri. Const. Art. XII. § 17: "No railroad or other corporation, or the lessees, purchasers, or managers of any railroad corporation, shall consolidate the stock, property, or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control, any railroad corporation owning or having under its control a parallel or competing line; nor shall

stitutional provisions, as will be observed, generally embrace other carrier corporations as well as railroad companies.

any officer of such railroad corporation act as an officer of any other railroad corporation owning or having the control of a parallel or competing line. The question whether railroads are parallel or competing lines shall, when demanded, be decided by a jury, as in other civil issues."

Montana. Const. Art. XV. § 6: "No railroad corporation, express or other transportation company, or the lessees or managers thereof, shall consolidate its stock, property, or franchises with any other railroad corporation, express or other transportation company, owning or having under its control a parallel or competing line; neither shall it in any manner unite its business or earnings with the business or earnings of any other railroad corporation; nor shall any officer of such railroad, express or other transportation company, act as an officer of any other railroad, express or other transportation company, owning or having control of a parallel or competing line."

Nebraska. Const. Art. XI. § 3: "No railroad corporation or telegraph company shall consolidate its stock, property, franchises, or earnings, in whole or in part, with any other railroad corporation or telegraph company owning a parallel or competing line; and in no case shall any consolidation take place, except upon public notice of at least sixty days to all stockholders, in such manner as may be provided by law."

North Dakota. Const. Art. VII. § 141: "No railroad corporation shall consolidate its stock, property, or franchises with any other railroad corporation owning a parallel or competing line; and in no case shall any consolidation take place except upon public notice given at least sixty days to all stockholders, in such manner as may be provided by law. Any attempt to evade the provisions of this section by any railroad corporation, by lease or

otherwise, shall work a forfeiture of its charter."

Pennsylvania. Const. Art. XVII. § 4: "No railroad, canal, or other corporation, or the lessees, purchasers, or managers of any railroad or canal corporation, shall consolidate the stock, property, or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control any other railroad or canal corporation owning or having under its control a parallel or competing line; nor shall any officer of such railroad or canal corporation act as an officer of any other railroad or canal corporation owning or having the control of a parallel or competing line; and the question whether railroads or canals are parallel or competing lines shall, when demanded by the party complainant, be decided by a jury as in other civil issues."

South Carolina. Const. Art. IX. § 7: "No railroad or other transportation company, and no telegraph or other transmitting company, or the lessees, purchasers, or managers of such corporation, shall consolidate the stock, property, or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control any other railroad or other transportation company owning or having under its control a parallel or competing line; and the question whether railroads or other transportation, telegraph, or other transmitting companies are parallel or competing lines shall, when demanded by the party complainant, be decided by a jury as in other civil causes."

South Dakota. Const. Art. XVII. § 14: "No railroad corporation shall consolidate its stock, property, or franchises with any other railroad corporation owning a parallel or competing line; and in no case shall any consolidation take place except upon public notice given out, at least sixty days, to all

In Colorado, Illinois, Kentucky, Michigan, Missouri, Montana, Nebraska, North Dakota, Pennsylvania, South Carolina, South Dakota, Texas, and West Virginia, the constitutional inhibition is against the consolidation of "competing or parallel lines." In Utah and Washington "competing" lines only are referred to.

Consolidation with a corporation "owning" a competing line is prohibited in Illinois, Kentucky, Michigan, Nebraska, North Dakota, South Dakota, Utah, Washington, and West Virginia, while in the constitutions of Missouri, Montana,

stockholders in such manner as may be provided by law. Any attempt to evade the provisions of this section by any railroad corporation, by lease or otherwise, shall work a forfeiture of its charter."

Texas. Const. Art. X. § 5: "No railroad or other corporation, or the lessees, purchasers, or managers of any railroad corporation, shall consolidate the stock, property, or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control any railroad corporation owning or having under its control a parallel or competing line; nor shall any officer of such railroad corporation act as an officer of any other railroad corporation owning or having the control of a parallel or competing line."

Art. X. § 6. "No railroad company organized under the laws of this State shall consolidate by private or judicial sale or otherwise with any railroad company organized under the laws of any other State or of the United States."

Utah. Const. Art. XII. § 13: "No railroad corporation shall consolidate its stock, property, or franchises with any other railroad corporation owning a competing line."

Washington. Const. Art. XII. § 16: "No railroad corporation shall consolidate its stock, property, or franchises with any other railroad corporation owning a competing line."

West Virginia. Const. Art. XI. § 11: "No railroad corporation shall consolidate its stock, property, or franchises

with any other railroad owning a parallel or competing line, or obtain the possession or control of such parallel or competing line, by lease or other contract, without the permission of the legislature."

Wyoming. Const. Art. X. § 8: "There shall be no consolidation or combination of corporations of any kind whatever to prevent competition, to control or influence productions or prices thereof, or in any manner to interfere with the public good or general welfare."

In contradistinction to the phrase "continuous or connecting lines" consolidation statutes, generally, employ the phrase "parallel or competing lines"—authorizing the consolidation of the one and prohibiting the consolidation of the other. Provisions prohibiting the consolidation of parallel or competing railroads appear in the statutes of the following States, some of which also, as will be observed, have similar constitutional provisions: Arkansas, Arizona, Connecticut, Florida, Idaho, Maryland, Minnesota, Mississippi, Montana, New York, Tennessee, Utah, Washington, West Virginia, Wisconsin. For references to consolidation statutes see note, *ante*, § 22: "*What Railroads may consolidate—Statutory Provisions.*"

In Florida (Acts 1887, p. 117), and New York (R. R. Laws, § 80, see *ante*, § 22, note), the railroad commissioners may authorize the consolidation of competing lines. For Minnesota statutes see *post*, § 35, note.

Pennsylvania, South Carolina, and Texas the similar provision reads — “owning or having under its control” such line.

In Georgia and Wyoming all contracts to prevent competition are prohibited and Texas does not permit consolidation with foreign railroad corporations at all.

The constitutions of Arkansas, Missouri, Montana, and Pennsylvania prohibit the officers of railroad companies from becoming officers in competing corporations. In Arkansas, Missouri, and Pennsylvania the question whether railroads are parallel or competing lines, is to be determined by the jury as in other civil issues.

The constitutions of North Dakota and South Dakota provide that any attempt by any railroad corporation to evade their provisions against consolidation shall work a forfeiture of its charter.

The West Virginia constitution prohibits the consolidation of competing or parallel lines “*without the permission of the legislature.*” As no consolidation is possible without legislative sanction this provision is, and was doubtless intended to be, wholly ineffective.

Statutory provisions against the consolidation of competing railroads have no *ex post facto* application.¹

§ 33. Construction of Prohibitions — (A) Meaning of Term “Consolidation.” — Constitutional and statutory provisions against the consolidation of competing lines of railroad are not penal in their nature, but are declaratory of the policy of the State in favor of the preservation of competition and are entitled to a liberal construction. The purpose of constitutional conventions in adopting such provisions and of legislatures in enacting such laws was to place an effective bar against any union of railroad companies whereby competition might be removed.²

¹ *Manchester, etc. R. Co. v. Concord R. Co.*, 66 N. H. 131 (1889), (20 Atl. Rep. 383).

² *Manchester, etc. R. Co. v. Concord R. Co.*, 66 N. H. 131 (1889), (20 Atl. Rep. 383): “The purpose of the legislature was to make the act in question

an effective instrumentality against the consolidation of competing roads through contracts or arrangements between them by means of which competition is removed.” See also *State v. Atchison, etc. R. Co.*, 24 Neb. 143 (1888), (38 N. W. Rep. 43, 8 Am. St. Rep. 164);

While, therefore, the term "consolidation" is generally used to describe a union of corporate properties and stockholders by the process of absorption or fusion, it has a broader meaning as used in constitutional and statutory provisions against the consolidation of competing railroads, and is here used in the sense of "join" or "unite."¹

In the recent case of *East St. Louis, etc. R. Co. v. Jarvis*,² Judge Jenkins said: "It is contended that the term 'consolidation' means a permanent union of the interests, management, and control of two roads, either in the formation of a new company out of the consolidated one, or else by consolidated management of the old ones unitedly while their distinct corporate entities still remained. This distinction is true in the general sense in which one speaks of the 'consolidation' of railroads. The term may also mean the act of forming into a more firm or compact mass, body, or system. The constitutional convention, representing the people of the State, sought to provide against monopolies, and to preserve to the public the benefit that would accrue from competition between parallel or competing lines of railway. It sought for practical results. It intended to provide that parallel or competing lines should continue to be competing, and this it aimed to accomplish by prohibiting the consolidation of the stock or the franchises or the property of any such competing lines of railway. The union of such lines was prohibited, in view of the objects sought to be accomplished. The term 'consolidate' we think must be construed to have been used in the sense of 'join' or 'unite.' To permit two such competing lines of railway under a single management and a

East St. Louis, etc. R. Co. v. Jarvis, 92 Fed. 743 (1899); *Morrill v. Railroad Co.*, 55 N. H. 531 (1875); *Gulf, etc. R. Co. v. State*, 72 Tex. 404 (1888), (10 S. W. Rep. 81).

¹ In *State v. Atchison, etc. R. Co.*, 24 Neb. 164 (1888), (38 N. W. Rep. 43, 8 Am. St. Rep. 164), the Supreme Court of Nebraska said: "This [the constitutional provision] is an absolute prohibition against a railroad corporation consolidating its stock, property, fran-

chises, or earnings, in whole or in part, with any other corporation owning a parallel or competing line. The word 'consolidate' is here used in the sense of join or unite. The constitutional convention aimed at practical results."

Power to join or unite, however, does not authorize consolidation. *Louisville, etc. R. Co. v. Kentucky*, 161 U. S. 684 (1896), (16 Sup. Ct. Rep. 714).

² *East St. Louis, etc. R. Co. v. Jarvis*, 92 Fed. 743 (1899).

single control would accomplish the very purpose which the constitution sought to prevent. We must have regard to the spirit and the object of that constitutional provision, and not juggle with the technical meaning of the word. The prohibition goes to the consolidation or uniting of the stock of two competing roads, or of the franchises of two competing roads, or of the property of two competing roads. The doing of either would create the prohibited monopoly, and either is within the intendment and meaning of the constitutional provision."

§ 34. **Construction of Prohibitions — (B) Whether a Lease amounts to Consolidation.** — It has been held that a *lease* of a competing railroad falls within a constitutional provision against the consolidation of competing lines.¹ The courts in so holding have based their conclusion upon the premise — indicated in the last section — that the term "consolidate" is broadly used in such inhibitions in the sense of "join" or "unite."

It may be doubted, however, whether the conclusion follows from the premise. In order to make the constitutional provisions effective instruments for the accomplish-

¹ *State v. Atchison, etc. R. Co.*, 24 Neb. 164 (1888), (8 Am. St. Rep. 164 38 N. W. Rep. 43): "The constitutional convention aimed at practical results. The character of the title of the parties operating a railway is of but little moment to the general public, while the requirement that different roads shall continue to be competing lines, as when they were constructed, is of the utmost importance to all. The law cannot be evaded, therefore, by substituting a lease for a deed of conveyance."

East St. Louis, etc. R. Co. v. Jarvis, 92 Fed. 743 (1899): "Nor do we think that there is force in the contention that this union or consolidation was by means of a temporary arrangement, if thereby that is accomplished which is prohibited by the constitution. If it be lawful, by means of a lease for ten years, to consolidate and unite the properties

of competing lines of railway, we perceive no reason why a lease for ninety-nine years would not be equally valid. We cannot draw the line in that respect between what is permanent and what is temporary. Whatever produces the prohibited result is obnoxious to the spirit and the letter of the constitutional provision, and is illegal. We must deal with the result accomplished, without regard to the means employed. It cannot be permitted that one may effect a prohibited result by indirection which he may not lawfully accomplish by direct means. We must therefore hold that the leases in question practically effected a consolidation of the properties of two competing lines, and are within the inhibition of the constitution."

Compare *Missouri Pacific R. Co. v. Owens*, 1 Tex. App. Civ. Cas. § 384 (1883).

ment of the purposes for which they were designed, a liberal construction is necessary and proper and the word "consolidate" may well be described as an equivalent for "join" or "unite." But these terms when applied to corporations would seem to imply some legal union or joinder — something more than the mere physical conjunction of corporate properties effected under a lease.

Constitutional provisions often expressly prohibit the leasing of competing roads, but, in the absence of such a prohibition, a construction which reads it into a constitutional provision by virtue of the use of the word "consolidate" is strained.¹

§ 35. Construction of Prohibitions — (C) Arrangements amounting to Consolidation. — An arrangement whereby one railroad company, in return for a guaranty of its bonds by a company owning a parallel and competing road, was to turn over one-half of its stock to the stockholders of the latter company, or to a trustee for their benefit, was held by the Supreme Court of the United States in *Pearsall v. Great Northern R. Co.*,² to constitute a clear violation of statutes prohibiting railroad companies from consolidating with or in any way owning or controlling other corporations having parallel or competing lines.³ Mr. Justice Brown said:

¹ In *Gere v. New York Central R. Co.*, 19 Abb. N. C. 210 (1885), the New York Supreme Court, in considering whether a lease came within the New York statute against the consolidation of competing lines, said: "The leasing of one railroad by another, whether for a longer or shorter period, is not a merger or consolidation. The term 'lease' implies the continued existence of the corporation, the lessor, with all its powers and functions, and all the rights incident to its creation, and it would be a gross misapplication of terms to hold that a leasing or contract for use by one railroad to another is a merger or consolidation of the two roads." Also *Wallace v. Long Island R. Co.*, 12 Hun (N. Y.), 460 (1877). A lease is not a consolidation within the meaning of

the *Montana* constitutional provision. *State v. Montana R. Co.*, 21 Mont. 221 (1898), (53 Pac. Rep. 623). See also *ante*, § 14: "Distinction between Consolidation and Lease."

² *Pearsall v. Great Northern R. Co.*, 161 U. S. 671 (1896), (16 Sup. Ct. Rep. 705).

³ *Minnesota. Laws 1874*, ch. 29 (Act of March 9, 1874): "No railroad corporation, or the lessees, purchasers, or managers of any railroad corporation, shall consolidate the stock, property, or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control any other railroad corporation owning or having under his control a parallel or competing line; nor shall any officer of such railroad corporation act as the

"The fact that one-half of the capital stock of the reorganized company is to be turned over to the shareholders of the Great Northern, which is, in turn, to guarantee the payment of the reorganized bonds, is evidence of the most cogent character to show that nothing less than a purchase of a controlling interest, and practically the absolute control, of the Northern Pacific is contemplated by the arrangement. With half of its capital stock already in its hands, the purchase of enough to make a majority would follow almost as a matter of course and the mastership of the Northern Pacific would be assured. That the transfer of the stock is to be made, not directly to the company, but to the shareholders, is immaterial, since it may be assumed that they would cast their votes in the interests of the company. . . . There is, however, in addition to that, an alternative provision that the transfer may be made to a trustee for the use of the stockholders, who would, of course, act as their agent and represent them as a body, and, in fact, stand as the company under another name. Doubtless these stockholders could lawfully acquire by individual purchases a majority, or even the whole of the stock of the reorganized company, and thus possibly obtain its ultimate control; but the companies would still remain separate corporations with no interests, as such, in common. This, though possible, would not be altogether feasible and would require considerable time for its accomplishment. In a few years the two companies might, by sales of the stock so acquired, become completely dissevered, and the interests of the stockholders of each company thus become antagonistic. Under the proposed arrangement, however, the Northern Pacific as a company, in return for a guaranty, which the

officer of any other railroad corporation owning or having the control of a parallel or competing line; and the question whether railroads are parallel or competing lines shall, when demanded by the party complainant, be decided by a jury as in other civil issues."

Laws of 1881, ch. 94 (Act of March 3,

1881): "No railroad corporation shall consolidate with, lease or purchase, or in any way become the owner of or control any other railroad corporation, or any stock, franchise, or rights of property thereof which owns or controls a parallel or competing line."

individual stockholders could not give, turns over to a trustee for the entire body of stockholders of the Great Northern one-half of its stock, with the almost certainty of the latter securing the complete control, and probably the ultimate amalgamation, of the two companies.”¹

Where persons in charge of an insolvent construction company which had contracted to build a railroad for a corporation, and had received all its stock and other assets as security, without beginning the work, transferred the stock of the construction company to the managers of another railroad in operation which would compete with the projected road if completed, the funds of such railroad company being used for the purchase, by which process the stocks and assets of the several companies were controlled by the same management, it was held that the evident purpose of the transaction was to violate by indirection the provisions of the constitution of Georgia declaring the purchase of the stock of one corporation by another, and any contract between them tending to lessen competition or to encourage monopoly, illegal and void.²

A prohibition against the consolidation of parallel or com-

¹ In *Pennsylvania R. Co. v. Commonwealth* (Pa. 1886), 7 Atl. Rep. 368, it was held that the purchase by one corporation of a sufficient amount of the stock of another corporation, owning a parallel and competing road, to give control of the latter, was in contravention of the Pennsylvania constitutional provision against the consolidation of corporations owning parallel or competing lines. See also *Pennsylvania R. Co. v. Commonwealth* (Pa. 1886), 7 Atl. Rep. 374.

Pooling contracts are invalid under a statute prohibiting consolidation. *Currer v. Concord R. Co.*, 48 N. H. 321 (1869); *Morrell v. Railroad Co.*, 55 N. H. 537 (1875); *Manchester, etc. R. Co. v. Concord R. Co.*, 66 N. H. 100 (1889), (20 Atl. Rep. 383.)

A traffic arrangement between parallel lines was held to be illegal in *Gulf,*

etc. R. Co. v. State, 72 Tex. 404 (1888), (10 S. W. Rep. 8). Compare, however, *People v. O'Brien*, 111 N. Y. 64 (1889), (18 N. E. Rep. 692).

² *Langdon v. Branch*, 37 Fed. 449 (1888). See also *Hamilton v. Savannah, etc. R. Co.*, 49 Fed. 415 (1892).

In *Dady v. Georgia, etc. R. Co.*, 112 Fed. 838 (1900), it was held in construing the Georgia constitutional provision, that where separate lines of railway transport freight and passengers for widely separated sections of two States, and no point on either road can be reached in any reasonable time by a passenger starting out on the other, consolidation does not tend to defeat competition and created a monopoly merely because two shallow rivers, on which steamboats carrying freight and passengers occasionally ply, are crossed by both lines.

peting railroads cannot be evaded by a judicial sale. "If, from reasons of public policy, the legislature declares that a railway shall not become the purchaser of a parallel or competing line, the purchase is not the less unlawful because the parties choose to let it take the form of a judicial sale."¹

§ 36. **Construction of Prohibitions — (D) Control of Competing Railroads by Holding Corporation.** — The question whether the acquisition of control of competing railroad companies by a holding corporation, formed for the purpose, is in contravention of constitutional or statutory provisions against the consolidation of competing lines, has recently occasioned much discussion, but has not, as yet, received judicial determination.²

The following principles and propositions are, however, established, and a decision of the question would seem necessarily to involve their application: —

(1) Prohibitions against the consolidation of competing railroads are declaratory of public policy.³

(2) Practical as well as technical consolidation contravenes such provisions.⁴

(3) Between the State and the corporation, acts of the stockholders may be regarded as acts of the corporation.⁵

¹ *Louisville, etc. R. Co. v. Kentucky*, 161 U. S. 693 (1896), (16 Sup. Ct. Rep. 714). In this case it was held also that acquiescence by the State in several purchases by a railroad of local lines which ran parallel to some of its own branches could not be treated as a contemporaneous construction of its charter authorizing, generally, consolidation with parallel and competing roads.

² The application of the State of Minnesota to the Supreme Court of the United States for leave to file an original bill for an injunction to restrain the alleged consolidation of two competing railroad companies by means of a holding corporation was denied because of the want of indispensable parties — only the holding corporation being named as defendant —

which could not be brought in without defeating the constitutional jurisdiction of the court. *Minnesota v. Northern Securities Co.*, 184 U. S. 199 (1902), (22 Sup. Ct. Rep. 308).

Subsequently the State of Washington filed a similar application making the railroad corporations and the holding corporation defendants, and, after a hearing, the Supreme Court granted leave to file the bill. *Washington v. Great Northern R. Co. et al.*, U. S. Supreme Ct. Oct. Term, 1901 (decided April 21, 1902).

³ *Ante*, §§ 33, 34, 35.

⁴ *Ante*, §§ 33, 34, 35.

⁵ In *People v. North River Sugar Ref'g Co.*, 121 N. Y. 582 (1890), (24 N. E. Rep. 834), the Court of Appeals of New York said: "The abstract idea

(4) Unity of ownership is distinguishable from community of interest.¹

(5) Assuming that an individual stockholder has the right to sell his stock, it does not necessarily follow that a majority of stockholders may combine to sell their stock.²

§ 37. Construction of Prohibitions — (E) What are Competing or Parallel Railroads. — To render railroads competing lines they must be substantial competitors for business. "The competition must be of some practical importance, such as is liable to have an appreciable effect on rates."³ Thus

of a corporation, the legal entity, the impalpable and intangible creation of human thought, is itself a fiction, and has been appropriately described as a figure of speech. It serves very well to designate in our minds the collective action and agency of many individuals as permitted by the law; and the substantial inquiry always is what, in a given case, has been that collective action and agency. As between the corporation and those with whom it deals, the manner of its exercise is usually material; but as between it and the State, the substantial inquiry is only what that collective action and agency has done, what it has in fact accomplished, what is seen to be its effective work, what has been its conduct." See also *State v. Standard Oil Co.*, 49 Ohio St. 137 (1892), (30 N. E. Rep. 279).

¹ The distinction between the ownership of controlling interests in competing railroad companies by individuals acting together in temporary harmony and the ownership of such interests by a single corporation is apparent, and is illustrated by the following language of Mr. Justice Brown in *Pearsall v. Great Northern R. Co.*, 161 U. S. 671 (1896), (16 Sup. Ct. Rep. 705): "Doubtless these stockholders could lawfully acquire by individual purchases a majority, or even the whole, of the stock of the reorganized company, and thus possibly obtain its ultimate control; but the companies would still remain separate corporations with no interests, as

such, in common. This, though possible, would not be altogether feasible, and would require considerable time for its accomplishment. In a few years the two companies might, by sales of the stock, so acquired, become completely dissevered and the interests of the stockholders of each company thus become antagonistic."

² *Pennsylvania R. Co. v. Commonwealth* (Pa. 1886), 7 Atl. Rep. 373, 29 Am. & Eng. R. Cas. 145: "During the argument counsel invoked the aid of the undoubted general principle that the ownership of shares of stock carries with it the legal right to sell, and contended that the owners of the shares of the South Pennsylvania Railroad Company could not legally be restrained from so doing and that an injunction against the purchase would have this effect. We do not think the principle applies to this case. We are not called upon to express any opinion as to the right of individual shareholders to sell their several shares *bona fide* in the open market. This, so far as they are concerned, is an intended sale in combination, for the express purpose of enabling them to abandon the rights and duties conferred and imposed upon them by the act incorporating the company and of putting the control of their company in the hands of its rival. This is an act contrary to the public policy of the State, which they have no right to do."

³ *Kimball v. Atchison, etc. R. Co.*, 46 Fed. 888 (1891).

two railroads which did not touch at any two common points, and between which, for a distance of forty miles, another railroad ran, and the traffic of one of which, except an unimportant amount, would in no event pass over the other, were held not to be competing lines.¹

“Parallel lines are not necessarily competing lines, as they not infrequently connect entirely different termini and command the traffic of distinct territories.”² Passenger travel over parallel streets of cities is not necessarily competing travel.³

Conversely, “competition between railroads may exist and yet their lines not run parallel, but cross each other at some point in their route.”⁴ Railroads having the same termini are competing lines although their roads are far apart and

¹ *Kimball v. Atchison, etc. R. Co.*, 46 Fed. 888 (1891).

² *Louisville, etc. R. Co. v. Kentucky*, 161 U. S. 698 (1896), (16 Sup. Ct. Rep. 714), where the Supreme Court of the United States said: “For instance, a line from Toledo to Cincinnati is substantially parallel with another from Chicago to Cairo; but they could scarcely be called competing, since one is dependent upon the traffic of the Northwest, while Cincinnati is a southern outlet of the traffic of the Northeastern States and the lower lakes. Another familiar instance is that of the three north and south railways through the State of Connecticut, one from Bridgeport to Pittsfield, in Massachusetts, another from New Haven to Springfield, and another from Norwich to Worcester. These are strictly parallel lines, but in only a limited sense competing, since they are between different termini and each is required for the trade of its own section of the State.”

³ In *Gyger v. Philadelphia, etc. R. Co.*, 136 Pa. St. 96 (1890), (20 Atl. Rep. 399), the Supreme Court of Pennsylvania said: “We think, also, that it is quite clear that the sense of ‘competing,’ which is the essential sense of the prohibition, is not applicable to the travel

upon the streets of cities and towns over passenger railways. The competition of traffic between distant points, by rival roads and canals, tends to promote cheap transportation and thereby tends to the public good. But if this is prevented by the absorption of one of the competing lines by the other, the wholesome competition ceases and higher rates soon result. This is the evil which was sought to be prevented by the fourth section of the seventeenth article. It will be seen at once that it is inapplicable to the travel upon the streets of cities and towns on passenger railways. The travel over parallel streets is not necessarily a competing travel. Each State has a travel of its own which is conducted upon its own railway. That travel may be almost entirely conducted without competition with the travel upon another, though parallel, street, nor do railways upon parallel streets have the same termini.”

⁴ *East Line, etc. R. Co. v. Rushing*, 69 Tex. 306 (1887), (6 S. W. Rep. 834); *East Line, etc. R. Co. v. State*, 75 Tex. 434 (1889), (12 S. W. Rep. 690); *Texas, etc. R. Co. v. Southern Pacific Co.*, 41 La. Ann. 970 (1889), (6 So. Rep. 888, 17 Am. St. Rep. 445); *East St. Louis, etc. R. Co. v. Jarvis*, 92 Fed. 743 (1899).

there is no pretension that they are parallel.¹ Two lines having but one common terminus may also be competing when one company has a traffic contract giving it the right to use a road running to the other terminus of the other road.² Competition *in fact* is what the constitutional and statutory provisions are designed to encourage, and for this reason it has been held that a railroad by its relations to other roads may be a competing line with a road with which it is not parallel and does not connect.³

The phrase "a parallel or competing line" includes a projected but not wholly constructed road if such road when completed and in operation would actually compete with the road seeking control. "Before completion it is 'parallel,' when completed it becomes 'competing.'" ⁴

The court may take judicial notice of the geography of the State, and the general direction of two railroads as fixed by their charters and can then determine whether they are parallel, but the existence of competition must be established by evidence as any other fact.⁵

¹ Texas, etc. R. Co. v. Southern Pacific Co., 41 La. Ann. 970 (1889), (6 So. Rep. 888, 17 Am. St. Rep. 445).

² Pennsylvania R. Co. v. Commonwealth (Pa. 1886), 7 Atl. Rep. 368, 29 Am. & Eng. R. Cas. 145. See also State v. Vanderbilt, 37 Ohio St. 590 (1882).

³ East Line, etc. R. Co. v. State, 75 Tex. 446 (1889), (12 S. W. Rep. 690): "We further concur with the court below in holding that railways by reasons of their relations with, control, or management of other lines than their own, may become, within the meaning of the law, competing lines, though the railroads owned by them may not in fact connect."

⁴ Pennsylvania R. Co. v. Commonwealth (Pa. 1886), 7 Atl. Rep. 368, 29 Am. & Eng. R. Cas. 145.

⁵ In East Line, etc. R. Co. v. Rushing, 69 Tex. 313 (1887), (6 S. W. Rep. 834), the Supreme Court of Texas said: "It may be that this court, judicially knowing the geography of the

State, might take notice from the general direction of these two roads as fixed by the statutes under consideration, that their lines must necessarily cross each other, and could therefore treat them as connecting lines, and not parallel to each other. But as to whether they were competing lines we could have no judicial notice whatever. Competition between railroads may exist and yet their lines not run parallel, but cross each other at some point in their route. Hence when a question as to such competition is raised, the court or jury must have proof upon the subject, as in the case of any other fact submitted for its consideration."

Compare, however, Gulf, etc. R. Co. v. State, 72 Tex. 410 (1888), (10 S. W. Rep. 81), where the same Court said: "Whether two roads which intersect each other at a certain point are competitors for freight or not, must depend upon a variety of circumstances not known to the court. But the authori-

§ 38. **Prohibition of Consolidation of Competing Railroads not a Regulation of Interstate Commerce.** — Corporations created by the State derive the power to consolidate from the State alone. The State may withhold such power entirely, may accompany a grant of it with such limitations as it may choose to impose, or, in the exercise of its police power, may take away the right when previously granted, if its operation may be prejudicial to the public welfare. The exercise of the authority of the State, in any of these forms, involves no interference with interstate commerce, for it relates entirely to a matter of State grant to a State corporation.¹

The corporation is merely the instrument of commerce, and the State may legislate concerning the instrument without regulating commerce. This distinction is pointed out by the Supreme Court of the United States in *Louisville, etc. R. Co. v. Kentucky*:² "In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their commerce and forbid interference therewith; while to the States remain the power to create and regulate the instruments of such commerce so far as necessary to the conservation of the public interests."

§ 39. **Constitutional Prohibitions against Consolidation of Competing Carrier Corporations other than Railroads.** — Con-

ties cited show that we must take judicial notice of the geography of the State and at least of its navigable streams. It is a matter of history that important lines of railroad once established have remained as fixed and permanent in their course as the rivers themselves. They supersede in the main all other modes of travel between the points which they touch and become as well, if not better, known than any other geographical feature of the country. Their locality becomes 'notorious and indisputable.' . . . We think we must take judicial notice that these roads are parallel and competing lines, and this is sufficient so far as the disposition of this case is concerned. . . . We cannot shut our eyes to the 'notorious and indis-

putable' facts that these parts of the respective lines touch at the same points and that they are natural competitors for the traffic of a large scope of country."

See also *Georgia Pac. R. Co. v. Gaines*, 88 Ala. 381 (1889), (7 So. Rep. 382).

¹ *Louisville, etc. R. Co. v. Kentucky*, 161 U. S. 701 (1896), (16 Sup. Ct. Rep. 714).

In *Ashley v. Ryan*, 153 U. S. 436 (1894), (14 Sup. Ct. Rep. 865), it was held that a State in permitting railroad companies to consolidate might impose such conditions as it deemed proper.

² *Louisville, etc. R. Co. v. Kentucky*, 161 U. S. 702 (1896), (16 Sup. Ct. Rep. 714), (*per Brown, J.*).

stitutional provisions against the consolidation of competing corporations do not apply to railroad companies alone. In proportion to their use by the public it is as essential that competition should be preserved in the case of other corporations of a *quasi*-public nature as in the case of railroad corporations.

Accordingly, constitutional provisions against the consolidation of competing lines, while nearly always applying to railroad companies, apply also — as the case may be — to telegraph,¹ telephone,² and “other transmitting companies,”³ and to canal,⁴ bridge,⁵ express,⁶ other “common carrier,”⁷ and “other transportation companies,”⁸ owning competing lines or structures. Other constitutional provisions prohibit the consolidation of “corporations of any kind whatever” for the purpose of preventing competition.⁹

The States generally have also enacted so-called “anti-trust,” statutes directed against combinations tending to create monopolies which are fully considered in a subsequent part of this treatise.¹⁰

§ 40. **Enforcement of Provisions against Consolidation of Competing Lines.** — The consolidation of competing or parallel railroad companies in the face of a constitutional or statutory prohibition is unlawful, and, therefore, *ultra vires*, and may be restrained at the suit of any stockholder.¹¹

¹ *Alabama*, Const. Art. XIV. § 11; *Colorado*, Const. Art. XV. § 13; *Kentucky*, Const. § 201; *Nebraska*, Const. Art. XI. § 3; *Pennsylvania*, Const. Art. XVI. § 12; *South Carolina*, Const. Art. IX. § 7; *South Dakota*, Const. Art. XVII. § 11.

² *Kentucky*, Const. § 201.

³ *South Carolina*, Const. Art. IX. § 7.

⁴ *Pennsylvania*, Const. Art. XVII. § 4.

⁵ *Kentucky*, Const. § 201.

⁶ *Montana*, Const. Art. XV. § 6.

⁷ *Kentucky*, Const. § 201.

⁸ *Montana*, Const. Art. XV. § 6; *South Carolina*, Const. Art. IX. § 7.

⁹ *Wyoming*, Const. Art. X. § 8. See also *Georgia*, Const. Art. IV. § 2.

¹⁰ See subdiv. II. Art. III. Part V., “*State Anti-trust Statutes*.”

¹¹ *Pearsall v. Great Northern R. Co.*, 161 U. S. 647 (1896), (16 Sup. Ct. Rep. 705); *Hafer v. Cincinnati, etc. R. Co.*, 29 Week. Law. Bul. 68 (Cin. 1893). See also *Clark v. Central R. Co.*, 50 Fed. 338 (1892); *Hamilton v. Savannah, etc. R. Co.*, 49 Fed. 412 (1892); *Kimball v. Atchison, etc. R. Co.*, 46 Fed. 888 (1891). Compare *Langdon v. Branch*, 37 Fed. 449 (1888).

In *Currier v. Concord R. Corp.*, 48 N. H. 321 (1869), it was held under the peculiar provisions of the New Hampshire act of 1867 (since repealed) that any citizen might sue to restrain the consolidation of competing railroads.

Such a consolidation is also a cause of forfeiture of the charters of the consolidating companies which may be enforced by the State in *quo warranto* proceedings.¹ The State may also enjoin such a consolidation and have the proceedings declared void, upon the ground that they are unlawful and contrary to the declared policy of the State.²

CHAPTER IV.

ASSENT OF STOCKHOLDERS.

- § 41. Requisite Number of Stockholders — (A) Under Laws in Force at Organization of Consolidating Corporations.
- § 42. Requisite Number of Stockholders — (B) When Unanimous Consent is necessary.
- § 43. Requisite Number of Stockholders — (C) Under Enactments in Exercise of Reserved Power.
- § 44. Power of Legislature to compel Consolidation under its Reserved Power.
- § 45. Assent of Stockholders — How manifested. Acquiescence. Estoppel.
- § 46. Rights and Remedies of Dissenting Stockholders.
- § 47. Rights and Remedies of Dissenting Subscribers.
- § 48. Procedure in Stockholders' Actions.
- § 49. Laches of Stockholders.
- § 50. Can a Majority effect Consolidation upon giving Security to Dissenting Stockholders?
- § 51. The Right to condemn Stock.

§ 41. Requisite Number of Stockholders — (A) Under Laws in Force at Organization of Consolidating Corporations. — Con-

¹ *State v. Vanderbilt*, 37 Ohio St. 590 (1882); *East Line, etc. R. Co. v. State*, 75 Tex. 434 (1889), (12 S. W. Rep. 690); *State v. Atchison, etc. R. Co.*, 24 Neb. 143 (1888), (38 N. W. Rep. 43). In the last case, however, the court did not adjudge a forfeiture but declared the offending contract void.

² *Louisville, etc. R. Co. v. Kentucky*, 161 U. S. 677 (1896), (16 Sup. Ct. Rep. 714); *Pennsylvania R. Co. v. Commonwealth* (Pa. 1886), 7 Atl. Rep. 368, 29 Am. & Eng. R. Cas. 145; *Pennsylvania R. Co. v. Commonwealth* (Pa. 1886), 7 Atl. Rep. 374; *Gulf, etc. R. Co. v. State*, 72 Tex. 404 (1888), (10 S. W. Rep. 81). In *People v. Boston, etc. R. Co.*,

12 Abb. N. C. 230, it was held that a proposed consolidation of four New York railroad companies was invalid because they were parallel within the meaning of the statute and because they did not form a continuous line; that an action by the attorney-general to annul the contract of consolidation was the proper remedy.

A suit by a State to restrain a consolidation of competing railroads in violation of a constitutional provision, does not involve rights of a proprietary or contractual nature, and the question whether a State in such a proceeding is such a party of the controversy as to confer original jurisdiction upon the

solidation directly affects the interests of each stockholder. He exchanges a larger interest in a smaller corporation for a smaller interest in a larger corporation. The corporate funds are embarked upon a new enterprise of wider scope. As will be shown, it is only when the rights of minority stockholders are constitutionally limited by legislation that consolidation can be effected without the unanimous consent of stockholders.¹

A statement, however, that unanimous consent, *as a general rule*, is essential to consolidation would be misleading in a modern treatise. General consolidation statutes almost invariably prescribe a proportion of shareholders whose consent is necessary to effect consolidation.² These statutes will, usually, be found to antedate the organization of corporations proposing to consolidate at the present time. The American railway corporation has not been distinguished for longevity.

Where, therefore, a general statute, in force at the time when the stock of the consolidating corporations was subscribed for, provides that the consolidation agreement may be ratified by the holders of a majority, or greater proportion, of the shares of each corporation, the consent of the prescribed majority is sufficient.³ Subscribers to the capital

Supreme Court of the United States arises in the case of the State of Washington *v. Great Northern R. Co. et al.*, now pending in that court.

¹ See next section.

² See *post*, § 52, "*Formal Statutory Requisites*," for abstract of statutes showing number of assenting shares required in different consolidation acts.

³ *Nugent v. Supervisors*, 19 Wall. (U. S.) 249 (1873): "The general statute of the State authorized all railroad companies then organized, or thereafter to be organized, to consolidate their property and stock with each other, and with companies out of the State, whenever their lines connect with the lines of such companies out of the State. . . . Nor is this all. The special charter of the Kankakee and Illinois River Railroad Company contained in its eleventh section an express

grant to the company of authority to unite or consolidate its railroad with any other railroad or railroads then constructed or that might thereafter be constructed within the State, or any other State, which might cross or intersect the same, or be built along the line thereof, upon such terms as might be mutually agreed upon between said company and any other company. It was therefore contemplated by the legislature, as it must have been by all the subscribers to the stock of the company, that precisely what has occurred might occur. Subscribers must be presumed to have known the law of the State and to have contracted in view of it. When the voters of the county of Putnam sanctioned a county subscription by their vote, and when the board of supervisors in pursuance of that section resolved to make the

stock of the corporations are presumed to know the laws of the State regarding consolidation, and to contract in view of them. The law enters into and forms a part of the contract.

A fortiori is this conclusion true where the charters of the corporations themselves contain provisions authorizing consolidation by a majority vote. Such provisions become a part of the contract between the stockholders and the corporation, and their unanimous consent is not essential to consolidation.¹

Power to consolidate conferred in the laws under which a corporation is organized, without any provision as to the necessary number of assenting shares, may be exercised by "proper corporate action," viz. a majority vote of the stockholders.²

subscription, they were informed by the law of the State that a consolidation with another company might be made; that the stock they proposed to subscribe might be converted into stock of the consolidated company, and that the liability they assumed might become owing to that company. With this knowledge and in view of such contingencies they made the contract."

See also *Wilson v. Salamanca*, 99 U. S. 499 (1878); *Mansfield, etc. R. Co. v. Brown*, 26 Ohio St. 224 (1875); *Sparrow v. Evansville, etc. R. Co.*, 7 Ind. 369 (1856); *Bish v. Johnson*, 21 Ind. 299 (1863).

¹ *Fisher v. Evansville, etc. R. Co.*, 7 Ind. 407 (1856); *Hanna v. Cincinnati, etc. R. Co.*, 20 Ind. 30 (1863); *Bish v. Johnson*, 21 Ind. 299 (1863); *Sparrow v. Evansville, etc. R. Co.*, 7 Ind. 369 (1856); *Atchison, etc. R. Co. v. Phillips County*, 25 Kan. 261 (1881).

Where the articles of association of a company prohibited consolidation without the consent of a majority of the stockholders it was held that another provision allowing the articles to be amended by a vote of two-thirds of the executive committee and a majority of the trustees did not authorize an amend-

ment changing the provision concerning the stockholders' consent to consolidation; that it only allowed amendments pertinent to the business and objects for which the association was organized. *Blatchford v. Ross*, 54 Barb. (N. Y.) 42 (1869), (5 Abb. Pr. 434.)

² In *Dady v. Georgia, etc. R. Co.*, 112 Fed. 842 (1900), Judge Speer said: "There are several grounds upon which complainants insist that they are entitled to relief. The first is that it requires the unanimous consent of the stockholders of the Georgia & Alabama Railway, before the complainants can be permitted to consolidate or merge that company with the Seaboard Air Line or the Florida Central & Peninsular." The judge then distinguished the case of *Alexander v. Railway Co.*, 108 Ga. 866 (1889), (33 S. E. Rep. 866), and continued: "In other words, the Supreme Court of the State seems carefully to distinguish a case like that before them and a case like that before this court; for here the Georgia & Alabama Railway is chartered under this general law, and the court adds that the provisions of the general railroad law are operative when that law constitutes the whole or a portion of the railroad

§ 42. **Requisite Number of Stockholders — (B) When Unanimous Consent is necessary.** — The principle upon which unanimous consent may be essential to consolidation is the principle of the Dartmouth College case,¹ enlarged in its application by the long line of authorities since that famous decision, that the charter of a private corporation and the association of the corporators thereunder constitute executed contracts, between the corporation and the State and between the stockholders and the corporation, within the protection of the constitutional provision against laws impairing the obligations of contracts.² The legislature has no right, except by express reservation, to pass any amendment to the charter of a private corporation which makes any material or fundamental change therein, without the consent of all the stockholders. Where, therefore, a corporation, when created, is without authority to consolidate, either under its charter or general laws, a grant of authority to consolidate, except in the form of an enabling act, makes a change of a material and fundamental character in its charter. The exercise of the power conferred under such conditions requires the unanimous consent of the stockholders.³

charter. What, then, is 'proper corporate action,' for the purpose of merger and consolidation, when this is made the policy of the State by its statutory law? Corporate action, then, is the majority vote of the corporation."

For Georgia statute under consideration in this case, see *ante*, § 22: "*What Railroads may consolidate — Statutory Provisions.*"

¹ Dartmouth College v. Woodward, 4 Wheat. (U. S.) 700 (1819).

² Pennsylvania College Cases, 13 Wall. (U. S.) 212 (1871); Wilmington R. Co. v. Reid, 13 Wall. (U. S.) 264 (1871); Delaware R. R. Tax, 18 Wall. (U. S.) 206 (1873). In Pearsall v. Great Northern R. Co., 161 U. S. 660 (1896), (16 Sup. Ct. Rep. 705), the principle is discussed and earlier cases reviewed.

³ United States: Clearwater v. Meredith, 1 Wall. 39 (1863); Pearce v. Madison, etc. R. Co., 21 How. 441 (1858);

Earl v. Seattle, etc. R. Co., 56 Fed. 911 (1893); Knoxville v. Knoxville, etc. R. Co., 22 Fed. 758 (1884).

To effect a consolidation of railroad companies subsisting under special charters not providing therefor, the consent of every stockholder must be given; and any one dissenting stockholder is entitled to an injunction against such consolidation. Mowrey v. Indianapolis etc. R. Co., 4 Biss. 78 (1866).

Illinois: Illinois, etc. R. Co. v. Cook, 29 Ill. 237 (1862). In Sprague v. Illinois River R. Co., 19 Ill. 174 (1857), it was held that an amendment to a railroad charter which authorized the consolidation of the road to be built under it with any other intersecting road was not an alteration in the charter of a fundamental nature.

Indiana: Fisher v. Evansville, etc. R. Co., 7 Ind. 407 (1856).

The relation between a railroad com-

In *Clearwater v. Meredith*,¹ Mr. Justice Davis said: "When any person takes stock in a railroad corporation, he has entered into a contract with the company that his interests shall be subject to the direction and control of the proper authorities of the corporation, to accomplish the object for which the company was organized. He does not agree that the improvement to which he subscribed should be changed in purpose and character, at the will and pleasure of a majority of the stockholders, so that new responsibilities, and, it may be, new hazards, are added to the original undertaking. He may be willing to embark in one enterprise, and unwilling to engage in another; to assist in building a short line of railway and averse to risking his money in one having a longer line of transit."

A statute declaring that "it shall be lawful" for corporations to consolidate is, with reference to corporations formed before its passage, merely an enabling act. It gives the consent of the State to consolidation when all the stockholders approve, but does not limit the rights of dissenting stockholders.² The passage of an amendment conferring power to

pany and a stockholder is one of contract; and any legislative enactment authorizing a material change in the powers or purposes of the corporation, if acted upon by the corporation, is not binding upon the stockholder, without his consent. *McCray v. Junction R. Co.*, 9 Ind. 358 (1857).

Kentucky: *Botts v. Simpsonville, etc. Turnpike Road Co.*, 88 Ky. 54 (1888), (10 S. W. Rep. 134); *Louisville, etc. R. Co. v. Howard*, 15 Ky. L. Rep. 25.

Michigan: *Tuttle v. Michigan Air Line Co.*, 35 Mich. 247 (1877).

Mississippi: *New Orleans, etc. R. Co. v. Harris*, 27 Miss. 517 (1854).

New Jersey: *Kean v. Johnson*, 9 N. J. Eq. 401 (1853); *Black v. Delaware, etc. Canal Co.*, 24 N. J. Eq. 455 (1873).

Ohio: *Mansfield, etc. R. Co. v. Brown*, 26 Ohio St. 223 (1875); *Chapman v. Mad River, etc. R. Co.*, 6 Ohio St. 119 (1856).

Texas: *Gulf, etc. R. Co. v. Newell*,

73 Tex. 334 (1889), (11 S. W. Rep. 342).

Vermont: *Stevens v. Rutland, etc. R. Co.*, 29 Vt. 545 (1857).

Contra: *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 42 (1858), where it was held that consolidation might be effected without the unanimous consent of stockholders if security were given to minority dissenting stockholders. See *post*, § 50.

¹ *Clearwater v. Meredith*, 1 Wall (U. S.) 40 (1863).

² *Mills v. Central R. Co.*, 41 N. J. Eq. 4 (1886): "The provision in that act that it should be lawful to lease or consolidate is merely a legislative authorization—a concession on the part of the legislature of the power to do that which could not lawfully be done without such authority. It is not an enactment that the directors may, without the consent of the stockholders of the company, lease, consolidate, or merge. Nor is it, in effect, an enactment

consolidate upon a corporation, which it has not attempted and may never attempt to exercise, does not *per se* affect the rights of stockholders.¹

In England, as there are no constitutional restraints upon Parliament, the consolidation of existing corporations may be authorized without the unanimous consent of their stockholders.

§ 43. **Requisite Number of Stockholders — (C) Under Enactments in Exercise of Reserved Power.** — After the decision in the Dartmouth College case, the States generally passed laws providing that all charters thereafter granted should be subject to amendment or repeal at the pleasure of the legislature and special provisions to the same effect have often been inserted in charters.

Under this reserved power the decisions are uniform that the legislature has the power to alter or repeal charters when necessary to protect the interests of the State or of the public, but there has been a conflict of judicial opinion as to the power of the legislature to alter charters for the mere purpose of changing the rights of the shareholders among themselves, as in the case of a grant of power to consolidate. On the one hand it has been held that the legislature, under such a reservation, has the right to authorize a consolidation of corporations, which can be carried into effect notwithstanding the objection of a minority of the stockholders;² on the other

that they may, with the consent of the majority of the stockholders, do so. But the statute is merely an enabling act — a law intended to give, once for all, a general legislative authority to lease, consolidate, or merge."

In *Clearwater v. Meredith*, 1 Wall. (U. S.) 39 (1863), the Supreme Court of the United States also said: "The act of the legislature of Indiana allowing railroad corporations to merge and consolidate their stock, was an enabling act — was permissive, not mandatory. It simply gave the consent of the legislature to whatever could lawfully be done, and which, without that consent, could not be done at all."

See also *Hamilton Mut. Ins. Co. v.*

Hobart, 2 Gray (Mass.), 543 (1854); *Alexander v. Railway Co.*, 108 Ga. 866 (1899), (33 S. E. Rep. 866).

¹ *Fry v. Lexington, etc. R. Co.*, 2 Mete. (Ky.) 314 (1859).

² *Market Street R. Co. v. Hellman*, 109 Cal. 571 (1895), (42 Pac. Rep. 225): "Corporations cannot, without the consent of all their stockholders, consolidate with others, except when the power so to do is given by their charters or by a general statute existing at the date of incorporation, or in those cases where the right is reserved by constitutional or statutory provision to the legislature to alter or amend the charter."

See also *Hale v. Cheshire R. Co.*, 161 Mass. 443 (1894), (37 N. E. Rep.

hand, it has been held that the legislature, under its reserved power to amend the charter of a corporation, cannot authorize a consolidation without the unanimous consent of the stockholders when the effect of the consolidation is to increase the liabilities of the stockholders or diminish the value of their stock;¹ and in New Jersey it has been broadly held that such a reservation is made by the State for its own benefit, is not intended to effect or change the rights of corporators as between themselves, and does not authorize the State to empower one part of the stockholders, for their own benefit, at their option, to change their contract with the other part;

307); *Durfee v. Old Colony R. Co.*, 87 Mass., 230 (1862); *Buffalo, etc. R. Co. v. Dudley*, 14 N. Y. 348 (1856).

In the *Pennsylvania College Cases*, 13 Wall. (U. S.) 213 (1871), the Supreme Court of the United States discussed at length the nature of corporate charters and the constitutional rights of the legislature in connection therewith. Regarding the exercise of reserved powers the Court said: "Cases often arise where the legislature, in granting an act of incorporation for a private purpose, either makes the duration of the charter conditional or reserves to the State the power to alter, modify, or repeal the same at pleasure. Where such a provision is incorporated in the charter it is clear that it qualifies the grant, and that the subsequent exercise of that reserve power cannot be regarded as an act within the prohibition of the Constitution. Such a power also, that is the power to alter, modify, or repeal an act of incorporation, is frequently reserved to the State by a general law applicable to all acts of incorporation, or to certain classes of the same, as the case may be, in which case it is equally clear that the power may be exercised whenever it appears that the act of incorporation is one which falls within the reservation and that the charter was granted subsequent to the passage of the general law, even though the charter contains no such condition

nor any allusion to such a reservation. Reservation in such a charter, it is admitted, may be made, and it is also conceded that where they exist the exercise of the power reserved by a subsequent legislature does not impair the obligation of the contract created by the original act of incorporation. Subsequent legislation altering or modifying the provisions of such a charter, where there is no such reservation, is certainly unauthorized if it is prejudicial to the rights of the corporators, and was passed without their assent, but the converse of the proposition is also true, that if the new provisions altering and modifying the charter were passed with the assent of the corporation and they were duly accepted by a corporate vote as amendments to the original charter they cannot be regarded as impairing the obligation of the contract created by the original charter."

¹ *Botts v. Simpsonville, etc. Turnpike Road Co.*, 88 Ky. 54 (1888), (10 S. W. Rep. 134).

In *Kenosha, etc. R. Co. v. Marsh*, 17 Wis. 13 (1863), it was held that the legislature, under its reserved power, had no right to authorize a radical fundamental change in the character of an enterprise; but whether consolidation worked such change *quaere*. See also *Mowrey v. Indianapolis R. Co.*, 4 Biss. (U. S.) 78 (1866).

that the power to alter or modify a charter is exercisable only with respect to the powers and franchises conferred in it.¹

The weight of authority is, however, opposed to the latter conclusion and is in favor of the proposition that the legislature, under its reserved power, has the right to authorize consolidation without the unanimous consent of stockholders; that the legislature and the majority are not both subordinate to the will of a dissenting minority. The stockholders, in joining the corporation, are deemed to take their shares subject to the possibility of alteration by the legislature.²

§ 44. **Power of Legislature to compel Consolidation under its Reserved Power.** — While the weight of authority supports the view that the legislature, in the exercise of its reserved power, may *authorize* the consolidation of corporations by the action of a majority of their stockholders its right to *compel* their consolidation, against the will of a majority, presents a very different question.

“Each and every shareholder contracts that the will of the majority shall govern in all matters coming within the limits of the act of incorporation.”³ This is a fundamental principle, and the legislature, while it may waive the public rights, has no more authority to divest the stockholders of a private corporation of their vested rights, based upon this principle, and compel them to become adventurers in a new enterprise than it has to force individuals to form a corporation.⁴ For

¹ *Zabriskie v. Hackensack R. Co.*, 18 N. J. Eq. 178 (1867), (90 Am. Dec. 617); *Black v. Delaware, etc. Canal Co.*, 24 N. J. Eq. 468 (1873).

² *Hale v. Cheshire R. Co.*, 161 Mass. 443 (1894), (37 N. E. Rep. 307); *Market St. R. Co. v. Hellman*, 109 Cal. 571 (1895), (42 Pac. Rep. 225).

³ *Dudley v. Kentucky High School*, 9 Bush, 578 (1873). Also *Durfee v. Old Colony, etc. R. Co.*, 5 Allen (Mass.), 242 (1862).

⁴ In *City of Knoxville v. Knoxville, etc. R. Co.*, 22 Fed. Rep. 763 (1884), Judge Baxter said: “But it was not competent for the legislature to do more in this respect than to waive the

public rights. It could not divest or impair the rights of the shareholders, as between themselves, as guaranteed by the company’s charter, without their consent. It was upon the faith of the stipulations contained in said charter that the shareholders subscribed to the capital stock, and thereby made themselves members of the corporation. These stipulations, as we have already seen, contemplated and provided for the construction of a railroad between the termini named, to be governed by the shareholders, in the manner and upon the terms prescribed. Each corporator is entitled to have the contract fairly interpreted and honestly enforced. The

these reasons it is clear that the legislature cannot compel the consolidation of corporations owing no public duties.¹

On the other hand the legislature may compel the consolidation of municipal and other essentially public corporations, including, as held by the Supreme Court of the United States, educational institutions.²

It has not, however, been directly decided that the compulsory consolidation of railroad companies and other *quasi*-public corporations is legal, nor does it appear that such legislation has ever been attempted.³ Upon principle it seems that the reasoning applicable to distinctly private corporations applies to them. They are private corporations owing public duties. The State may hold them strictly to the performance of those duties and, for public reasons, may take away existing rights to consolidate.⁴ It would seem that the converse of

charter invests the owners of a majority of the capital stock with the right to control the corporate business within the scope of its provisions. Within this limit the power of a majority, when acting in good faith, is supreme."

¹ *Mason v. Finch*, 28 Mich. 282 (1873).

² *Pennsylvania College Cases*, 13 Wall. (U. S.) 214 (1871): "Apply those principles to the case under consideration, and it is quite clear that the decision of the State court was correct, as the fifth section of the charter, by necessary implication, reserves to the State the power to alter, modify, or amend the charter without any prescribed limitation. Provision is there made that the constitution of the college shall not be altered or alterable by any ordinance or law of the trustees, 'nor in any other manner than by an act of the legislature of the Commonwealth,' which is in all respects equivalent to an express reservation to the State to make any alteration in the charter which the legislature in its wisdom may deem fit, just, and expedient to enact, and the donors of the institution are as much bound by that provision as the trustees."

³ The question is raised in *Mowrey v. Indianapolis, etc. R. Co.*, 4 Biss. (U. S.) 78 (1866). In an early case in Connecticut (*Bishop v. Brainard*, 28 Conn. 289) (1859), it was said that the legislature, under its reserved power of amending a charter, might effect a consolidation of corporations by its direct action without any action upon the part of the stockholders or directors of the corporation. It appeared, however, that the directors and a majority of the stockholders had voted to ratify the consolidation so that the remarks of the court were *dicta* and the decision should rather be considered as holding that *antecedent* action by stockholders is not essential to consolidation than as holding that the legislature, even in the exercise of its reserved power, can compel corporations to consolidate against the will of a majority of their stockholders.

⁴ *Gibbs v. Consolidated Gas Co.*, 130 U. S. 407 (1889), (9 Sup. Ct. Rep. 553), where it was held that the legislature by a compulsory amendment to the charter of a gas company might prohibit the exercise of an existing right to consolidate with any other gas company. See also *ante*, §§ 24, 25, 26.

the proposition must necessarily follow, that the State cannot, itself, change the nature of the duties and the ability of the corporation to perform them by compelling consolidation.

§ 45. **Assent of Stockholders—How manifested. Acquiescence. Estoppel.**—While the assent of a stockholder to a proposed consolidation should regularly be expressed by his vote at a stockholders' meeting or by his approval in writing—as the consolidation act may provide—he cannot, after acquiescing in a consolidation and after the new corporation has taken charge of the property of the constituent corporations, attack the validity of the consolidation on the ground that he did not assent thereto. A stockholder who takes an active part in a consolidation estops himself from alleging his want of consent and, in the absence of fraud, from raising future objections.¹ A stockholder who consents to a consolidation is also estopped from questioning the regularity of the steps leading up to it. Thus, where an unauthorized amendment was accepted and adopted by the directory of a corporation, on the faith of which a consolidation was made, under legislative sanction, with another corporation, stockholders consenting to the consolidation were held to be estopped to dispute the validity of the amendment.² Where, however, an amendment did not, on its face, give the power to consolidate, a stockholder was held not to be estopped by his failure to object to it in season.³ The merely preliminary

¹ Glymont Imp., etc. Co. v. Toler, 80 Md. 278 (1894), (30 Atl. Rep. 651); Branch v. Atlantic, etc. R. Co., 3 Wood (U. S.), 481 (1879); Boston, etc. R. Co. v. New York, etc. R. Co., 13 R. I. 265 (1881) (sale); Phinizy v. Augusta, etc. R. Co., 62 Fed. 684 (1894).

A person subscribing for the stock of a consolidated corporation thereby consents to the consolidation. Fisher v. Evansville, etc. R. Co., 7 Ind. 470 (1856).

Where a stockholder in a consolidating corporation participated in all the proceedings incident to consolidation and permitted the corporation so formed to control the corporate busi-

ness and property, and third persons to purchase the mortgage bonds of the new company, and to acquire other rights and interests based on its lawful existence, the fact that at a foreclosure sale under the mortgage bonds issued by the *de facto* company, he notified purchasers that he would contest the consolidation, does not prevent him from being estopped to attack such consolidation. Bradford v. Frankfort, etc. R. Co., 142 Ind. 383 (1895), (40 N. E. Rep. 741), (41 N. E. Rep. 819).

² Deaderick v. Wilson, 8 Baxt. (Tenn.) 108 (1874).

³ International, etc. R. Co. v. Bremond, 53 Tex. 96 (1880): "Nor had

vote of a director in favor of consolidation will not preclude him from subsequently objecting as a stockholder.¹

§ 46. **Rights and Remedies of Dissenting Stockholders.**— When the unanimous consent of stockholders is essential to consolidation, a dissenting stockholder is entitled to an injunction restraining a proposed consolidation on the ground that the funds of the corporation are being diverted to objects not authorized by its charter.² A dissenting stockholder has also a right of action in equity against the consolidated corporation, in the case of an unauthorized consolidation, upon the theory of a wrongful appropriation by it of his equitable interest in the original corporation.³

he, by failing to object to a subsequent enlargement of the charter, which, whether it actually gave such power or not, did not on its face purport to give any power to consolidate, precluded himself from objecting to a consolidation making so fundamental a change in the objects of the corporation. . . . A stockholder may be estopped by his conduct from further objecting to a consolidation which was attempted without authority; but in the present case the conduct and action of Bremond have not . . . been such as to preclude him from still refusing to go into the new enterprise, or from demanding full compensation for his interest in the old."

¹ If a member of a board of directors of a corporation be present at the adoption of a resolution, and is aware of what is going on, and makes no opposition to its adoption, he must be presumed to have assented to it. But if such proceeding is merely preliminary to a subsequent vote of the stockholders on the consolidation of the corporation with another, which can only ultimately be decided by the stockholders, he will not be estopped from afterwards objecting as a stockholder. *Mowrey v. Indianapolis, etc. R. Co.*, 4 Biss. (U. S.) 78 (1866).

² *Clearwater v. Meredith*, 1 Wall. 40 (1863): "Clearwater could have

prevented this consolidation had he chosen to do so; instead of that he gave his assent to it and merged his own stock in the new adventure. If a majority of the stockholders of the corporation of which he was a member had undertaken to transfer his interest against his wish, they would have been enjoined. There was no power to force him to join the new corporation, and to receive stock in it on the surrender of his stock in the old company."

See also *Blatchford v. Ross*, 54 Barb. (N. Y.) 42 (1869); *Botts v. Simpsonville, etc. Turnpike Road Co.*, 88 Ky. 54 (1888), (10 S. W. Rep. 134); *Mowrey v. Indianapolis, etc. R. Co.*, 4 Biss. (U. S.) 78 (1866); *Zabriskie v. Hackensack, etc. R. Co.*, 18 N. J. Eq. 178 (1867), (90 Am. Dec. 617); *Stevens v. Rutland, etc. R. Co.*, 29 Vt. 545 (1857); *Young v. Rondout, etc. Gas Light Co.*, 129 N. Y. 57 (1891), (29 N. E. Rep. 83).

³ A stockholder in a railway company, which, against his protest, has been consolidated with another company, by the action of other stockholders, and whose equitable interest has been wrongfully appropriated by the consolidated company, cannot maintain an action for the injury against the directors of the company as such; nor are directors responsible for a consolidation effected by stockholders. He,

When an illegal consolidation has been brought about by the action of the stockholders a dissenting stockholder cannot maintain an action for damages against the directors.¹ While a dissenting stockholder may enjoin a consolidation, one of the constituent companies, itself, cannot, after agreeing to a consolidation, object to its validity on the ground that all its stockholders did not assent thereto.²

§ 47. **Rights and Remedies of Dissenting Subscribers.**—Where authority to consolidate does not exist at the time when a corporation is chartered and where power to amend or repeal is not reserved, a grant of authority to consolidate works a change of a fundamental nature in the charter of a corporation and, it is held, exonerates dissenting subscribers for the stock of the corporation from further liability upon their subscriptions.³ Mr. Justice Strong, in *Nugent v. Supervisors*,⁴ thus stated the reason for the rule: "It must be conceded, as a general rule, that a subscriber to the stock of a railroad company is released from obligation to pay his subscription by a fundamental alteration of the charter. The reason of the rule is evident. A subscription is always presumed to have been made in view of the main design of the corporation, and of the arrangements made for its accomplishment. A radical change in the organization or purposes of the company may, therefore, take away the motive which induced the subscription, as well as affect injuriously the con-

however, has an equitable action against the consolidated company for the wrongful appropriation of his interest. *International, etc. R. Co. v. Bremond*, 53 Tex. 96 (1880).

A stockholder in a constituent corporation who has not converted his stock into the stock of the consolidated company, has no footing to maintain a stockholders' bill against that company. *Philadelphia, etc. R. Co. v. Catawissa R. Co.*, 53 Pa. St. 20 (1866).

¹ *International, etc. R. Co. v. Bremond*, 53 Tex. 96 (1880).

² *St. Louis, etc. R. Co. v. Terre Haute R. Co.*, 33 Fed. 440 (1888).

³ *United States: Nugent v. Super-*

visors, 19 Wall. 248 (1873); *Clearwater v. Meredith*, 1 Wall. 25 (1863).

Indiana: Shelbyville, etc. Turnpike Co. v. Barnes, 42 Ind. 498 (1873); *Booe v. Junction R. Co.*, 10 Ind. 93 (1857); *McCray v. Junction R. Co.*, 9 Ind. 358 (1857); *State v. Bailey*, 16 Ind. 46 (1861). (79 Am. Dec. 405).

Mississippi: New Orleans, etc. R. Co. v. Harris, 27 Miss. 517 (1854).

North Carolina: Charlotte First Nat. Bank v. Charlotte, 85 N. C. 433 (1881).

England: Dougan's Case, 28 L. T. Rep. 60 (1873).

⁴ *Nugent v. Supervisors*, 19 Wall. 248 (1873).

sideration of the contract. For this reason it is held that such a change exonerates a subscriber from liability for his subscription; or, if the contract has been executed, justifies a stockholder in resorting to a court of equity to restrain the company from applying the funds of the original organization to any project not contemplated by it."

A subscriber is, however, entitled to the benefit of his contract as made and is neither obliged to withdraw from it nor to embark in a new venture.¹

This rule, that the unconstitutional grant of authority to consolidate operates as a dissolution of the subscription contract and as a release of dissenting subscribers, is supported by the highest authorities. It is difficult, however, to justify it upon legal principles. An act unconstitutional as to a dissenting subscriber would seem to be void as to him. To say that it dissolves the subscription contract is to give effect to a void act. The distinction drawn between the position of a stockholder and that of a subscriber — treating the latter as a party to an executory contract only — is inaccurate. The effect of an ordinary subscription is, immediately, to constitute the subscriber a stockholder, subject to the liability to pay his subscription when called. Only a contract to subscribe for stock at a future time can properly be called an executory contract.

The general rule stated is inapplicable in a case where it is apparent from the articles of association that consolidation was one of the purposes for which the corporation was organized and that the consolidation in question is only carrying out that purpose. Consolidation, under such conditions, does not discharge a subscriber from the payment of his subscription, although authority to consolidate was granted after the subscription.²

¹ "The stockholders in the old corporation, who do not enter into the new corporation, are, therefore, in the absence of such statutes, entitled to withdraw from the venture and cease to be liable on their stock subscriptions. But in the absence of a statute existing at the time of his subscription, providing for the consolidation upon a vote less

than the whole, or for the purchase of the interests of dissenting stockholders in the event of a consolidation, it is conceived that he will neither be bound to consent to the consolidation nor to surrender his interest in his original corporation." 1 Thomp. on Corp. § 343.

² *Hanna v. Cincinnati, etc. R. Co.*, 20 Ind. 30 (1863).

§ 48. **Procedure in Stockholders' Actions.** — When a majority has taken steps towards an unauthorized consolidation or when unanimous consent is necessary, a dissenting stockholder may file a bill for an injunction and it is not necessary that he should first seek relief through the corporation. In *Nathan v. Tompkins*¹ the Supreme Court of Alabama said: "When the injury is to the shareholder individually, or there is a real contest between him and the corporation growing out of the acts of a majority of the stockholders in convention, and in excess of their powers, express or implied, he may maintain a suit to prevent the wrong without the vain and useless ceremony of attempting to induce the same majority to sue themselves. A dissenting stockholder may, under such circumstances, enjoin an unauthorized consolidation."

The stockholder is protecting his *own rights*, and it is immaterial whether he is acting in good faith for the interests of the corporation.² The injunction is granted to restrain the officers and managers of the corporation from diverting its funds, but it is necessary to make the corporation a party defendant.³ An injunction once issued restraining an attempted consolidation will not be dissolved unless it is established by proof that the consolidation agreement has been cancelled. Allegations that the scheme has been abandoned are not sufficient.⁴

¹ *Nathan v. Tompkins*, 82 Ala. 437 (1891), (2 So. Rep. 747). *Contra*, however, *Mozley v. Alston*, 1 Phil. Ch. 790 (1847).

² *Central R. Co. v. Collins*, 40 Ga. 617 (1861).

³ *Ridgway Township v. Griswold*, 1 McCrary (U. S.) 151 (1878).

⁴ *Nathan v. Tompkins*, 82 Ala. 446 (1886), (2 So. Rep. 747): "The answers do not aver that the resolutions have been rescinded, or any attempt made to rescind them, or any official declaration of the abandonment. The resolutions remain in force on the minutes, so far as the majority could impart vitality. In view of the character of the resolutions, — that the consolidation 'do now

take place,' and be fully carried into effect, — a secret, uncommunicated intention to abandon, resting in the minds of the majority as individuals, does not meet the requirements of equity."

In *Blatchford v. Ross*, 54 Barb. (N. Y.) 42 (1869), it was held that an injunction restraining the consummation of the consolidation of two corporations would not be extended to prevent the use by the consolidated company of property delivered before the injunction was applied for, but would be continued to prevent the delivery of any more property and the taking of any steps to enforce consolidation upon unwilling stockholders.

An injunction against an attempted consolidation will not be dissolved upon an answer which fails to allege the consent of the plaintiff, where the unanimous consent of the stockholders is essential to consolidation.¹

§ 49. **Laches of Stockholders.**—Laches in bringing suit will preclude a dissenting stockholder from enjoining a consolidation. He cannot look to equity, but must content himself with some other form of remedy.² Reasonable haste is, however, sufficient.³ Acquiescence for an extended period, during which time the interests of third persons have intervened, may itself constitute laches and prevent a stockholder from attacking a consolidation even on the ground of fraud.⁴

§ 50. **Can a Majority effect Consolidation upon giving Security to Dissenting Stockholders?**—It was held by the Supreme Court of Pennsylvania in an early case that a consolidation might be effected by the action of a majority of the stockholders of the consolidating corporations, provided dissenting stockholders were secured from loss and their stock taken at an appraisal, although no statutory provision sanctioned such course nor removed the necessity for unanimous consent.⁵

¹ *Botts v. Simpsonville, etc. Turnpike Road Co.*, 88 Ky. 54 (1888), (10 S. W. Rep. 134).

² *Chapman v. Mad River, etc. R. Co.*, 6 Ohio St. 120 (1856); *International, etc. R. Co. v. Bremond*, 53 Tex. 96 (1880).

³ *Mills v. Central R. Co.*, 41 N. J. Eq. 1 (1886), (2 Atl. Rep. 453).

⁴ *Bell v. Pennsylvania R. Co.* (N. J. 1887), 10 Atl. Rep. 741 (1887). In this case there was five years delay.

In *Rabe v. Dunlap*, 51 N. J. Eq. 40 (1893), (25 Atl. Rep. 959), it was held that where a corporation chartered prior to the passage of the consolidation act, consolidated with other corporations for the purpose of carrying on a business essentially different from that for which it was organized, equity might protect the nonassenting stockholders, if application was made promptly; but that equity would not dissolve the con-

solidated company, and return, free from all liens, the property contributed by the corporation in which complainants were stockholders where for three years they had neglected to ask the aid of equity, and had stood quietly by while the consolidated corporation had incurred liabilities and the rights of third persons had intervened.

⁵ *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 42 (1852). See also *State v. Bailey*, 16 Ind. 46 (1861), (79 Am. Dec. 410).

In *McVicker v. Ross*, 55 Barb. (N. Y.) 247 (1869), it was held, in the case of a consolidation of two joint stock companies, that although a dissenting shareholder was not obliged to surrender his interests to remaining associates at an estimated valuation, but had the right to have the valuation actually ascertained by a sale, in the ordinary manner of closing up partnerships where

While this decision has been referred to, apparently with approval, in other cases, it is opposed to the weight of authority and contravenes fundamental principles. It is not within the power of courts of law or of equity, in the absence of special statutory authority authorizing the exercise of the power of eminent domain with respect to *quasi*-public corporations, to decree that the stock of dissenting stockholders shall be taken for the purpose of quieting opposition.¹

The language of Lord Eldon in granting an injunction against an unauthorized extension of the business of a voluntary association at the suit of a dissenting member, although it was proposed to indemnify him, is appropriate: "The right of a partner is to hold to the specific purposes his partners while the partnership continues, and not to rest upon indemnities with respect to what he has not proposed to engage in."²

§ 51. **The Right to condemn Stock.** — The legislature has power to authorize the consolidation of railroad and other *quasi*-public corporations, without the unanimous consent of their stockholders, when it makes provision for appraising and paying for the stock of dissenting stockholders. This power is entirely unaffected by the constitutional prohibition against impairing the obligations of contracts and is based upon the sovereign power of eminent domain. Corporate shares, as well as all other property, are subject to the paramount necessities of the State for the promotion of public interests.³

there is no express stipulation; yet that where the amount of dissenting stock was inconsiderable in comparison with the stock whose owners had acquiesced in the agreement of consolidation, the court would order the consolidated company to give a bond conditioned that upon final judgment all the property transferred should, if required, be delivered into the custody of the court for the protection of all the shareholders.

¹ *Mills v. Central R. Co.*, 41 N. J. Eq. 1 (1886), (2 Atl. Rep. 453); *Black v. Delaware, etc. Canal Co.*, 22 N. J. Eq. 406 (1871); *Mowrey v. Indianapolis, etc. R. Co.*, 4 Biss. (U. S.) 84 (1866).

² *Natusch v. Irving*, 2 Cooper Ch. 358 (1824). See also *Stevens v. Rutland, etc. R. Co.*, 29 Vt. 545 (1851).

³ In *Black v. Delaware, etc. Canal Co.*, 24 N. J. Eq. 469 (1873), it was held that in the exercise of the right of eminent domain the legislature might authorize shares in corporations and corporate franchises to be taken for public purposes upon just compensation, and that the legislature might, when public necessity required it, grant authority to consolidate or lease, if it provided just compensation for the shares of such stockholders, as dissented, and that the act in question did provide

Accordingly, in exceptional instances, statutes have been passed,¹ for the promotion of railroad and similar consolidations, providing, under varying conditions, that the stock of dissenting minority stockholders may be appraised and condemned, and such statutes have been held to be constitutional.² Statutes of this character are, however, strictly construed, and it has been held that authority to condemn the shares of dissentient stockholders for the purposes of consolidation does not warrant the taking of such shares for the purposes of a lease.³

These statutes must be distinguished from the provisions in modern consolidation acts authorizing, as a condition of consolidation, an appraisal of, and payment for, the stock of objecting stockholders.⁴ It is not the purpose of these provisions to authorize the condemnation of stock in order to quiet opposition. Consolidation statutes containing them do not require unanimous stockholders' consent nor can such provisions be made available to obtain the required consent.

compensation for unwilling stockholders, before their property was taken.

See also an article entitled "Corporate Shares and Eminent Domain," by Leonard M. Daggett, published in *Yale Law Journal*, May, 1896.

¹ The statute under consideration in *Black v. Delaware, etc. Canal Co.*, 24 N. J. Eq. 469 (1873), was the *New Jersey* act of March 17, 1870. See also *Illinois Stat.* 1897, ch. 32, authorizing the exercise of the right of eminent domain in aid of the consolidation of gas companies.

In Connecticut the following statute conferring most remarkable powers in behalf of a majority interest was passed in 1895: "In case any railroad company acting under the authority of the laws of this State shall have acquired more than three-fourths of the capital stock of any steamboat company, ferry company, bridge company, wharf company, or railroad company, and cannot agree with the holders of outstanding stock for the purchase of

the same, upon a finding by a judge of the Superior Court that such purchase will be for public interest, it may cause such outstanding stock to be appraised in the manner provided by section 3464 of the general statutes [section providing for the appraisal of real estate taken for railroad purposes]; and when said appraisement shall have been paid or deposited as provided in said section, the stockholder or stockholders whose share or shares shall have been so appraised, shall cease to have any interest therein, and shall, on demand made, surrender said stock and all certificates thereof to the corporation applying for such appraisal, and upon the deposit of said appraisal, said certificate shall be deemed to be cancelled." Pub. Acts 1895, ch. 232, § 1.

² *Mills v. Central R. Co.*, 41 N. J. Eq. 1 (1886), (2 Atl. Rep. 453).

³ *Mills v. Central R. Co.*, 41 N. J. Eq. 1 (1886), (2 Atl. Rep. 453).

⁴ See "*Statutory Provisions for Appraisal of Stock*," *post*, § 57.

Their design is to afford the dissenting stockholder an additional remedy — to give him the privilege of selling out instead of embarking in the new enterprise.

CHAPTER V.

METHOD OF CONSOLIDATION.

- § 52. Formal Statutory Requisites.
- § 53. When Consolidation is effected.
- § 54. Construction of Statutes prescribing Mode of Consolidation.
- § 55. What Statutory Provisions Conditions Precedent.
- § 56. What Statutory Provisions not Conditions Precedent.
- § 57. Statutory Provisions for Appraisal of Stock.

§ 52. **Formal Statutory Requisites.** — Although, as already noted, it has been held that the consolidation of corporations may be effected by the direct act of the legislature, without any antecedent action on the part of the corporations,¹ such legislative power, if existent, is seldom exercised. Nearly all the States, however, authorize the consolidation of corporations of their own volition and many have enacted general statutes designating the steps necessary to bring about that result.²

¹ *Bishop v. Brainerd*, 28 Conn. 289 (1859).

² *Alabama*. Code 1895, ch. 28, § 1166, (as amended by acts 1900–1901, p. 237): Directors of railroad companies consolidating enter into an agreement under corporate seal for consolidation, prescribing the terms and conditions thereof, etc. Agreement must be submitted to separate stockholders' meetings and must be sanctioned by a vote of at least *two-thirds* in amount of the stockholders present.

Sections 1148, 1149 prescribe method of consolidating business corporations.

Arizona. R. S. 1901, par. 864: In consolidation of railroad companies

agreement "upon such terms as directors of respective companies may agree upon" must be submitted to stockholders of the respective corporations representing *three-fourths* of the subscribed capital stock and must be ratified and confirmed by such stockholders.

Arkansas. S. & H. Digest, 1894, §§ 6315, 6332: To effect consolidation, contract, fixing terms and conditions must be assented to by *two-thirds* in interest of all the issued capital stock of the companies proposing to consolidate, at a stockholders' meeting regularly called for the purpose.

California. Pom. Code 1901, § 473: Method of consolidating railroads same

These statutes, while varying in detail, are similar in their general nature, and the process of consolidation as prescribed in most of them may be outlined as follows:

as Arizona, *ante*. Code 1886, § 361: Consolidation of mining companies requires consent of holders of *two-thirds* of capital stock.

Colorado. Mills Anno. Stat. 1891, § 605, authorizes consolidation of railroad companies under certain conditions by *majority* vote, and § 625 requires a *two-thirds* vote — applicable to consolidation under different statutes.

Consolidation of business corporations requires vote of *three-fourths* of stock, *ib.* § 628.

Connecticut. G. S. 1888, §§ 3444, 3445: Directors of railroad companies enter into joint agreement prescribing terms and conditions of consolidation. Agreement must be submitted to stockholders of each company at a special meeting thereof, called separately for the purpose, and if *two-thirds* of all the votes of all the stockholders are for the adoption of the agreement, the companies may consolidate. P. A. 1901, ch. 157, § 38, prescribes a similar method for consolidation of business corporations.

Delaware. Laws 1899 (Corp. Law), § 54: Directors, or majority of them, enter into an agreement under the corporate seal of respective corporations prescribing terms and conditions. The *written consent* of the owners of at least *two-thirds* of the capital stock of each corporation is necessary to the validity and adoption of the agreement.

Under 1901 Act (Corp Law), § 59, p. 308: Directors, or majority of them, enter into an agreement under corporate seals of respective corporations. Agreement submitted to stockholders of each corporation at a *meeting* called separately for the purpose, and must be ratified by *two-thirds* in amount of the capital stock.

Illinois. R. S. 1901, § 39, p. 1376: Terms of consolidation must be approved by stockholders owning not less

than *two-thirds* in amount of the capital stock of each corporation.

Indiana. R. S. 1901 (Burns'), § 5257: Consolidation may be upon such terms as corporations may mutually agree upon in accordance with the laws of the adjoining State with whose road or roads connections are formed.

Idaho. Laws 1901, p. 214: Article stating terms of consolidation must be approved by each corporation by a vote of the stockholders owning a *majority* of the stock (Applies to Laws 1901 "Consolidation").

R. S. 1887, § 2673: No amalgamation or consolidation can take place without the written consent of the holders of *three-fourths* in value of all the stock in each corporation.

Iowa. Code 1897, § 2036: Consolidation must be made with the consent of *three-fourths* in interest of all the stockholders upon such terms as may be agreed upon.

Kansas. G. S. 1897, ch. 70, § 93: Companies contract, fixing terms, which must be ratified and approved by holders of *two-thirds* of all the stock of each company, either at a meeting of the stockholders called for the purpose or by approval in writing.

Kentucky. Stat. 1899, ch. 32, § 555, Art. 1: Directors enter into agreement prescribing terms and conditions, which must be ratified by the owners of at least *two-thirds* of the capital stock of each corporation.

Louisiana. R. L. 1897, § 757: Terms and conditions are agreed upon in writing by corporations and must be approved by a *majority*, or such a number as may be required by the original charters of consolidating companies.

R. S. 1897, p. 758: Only formalities required for consolidation are the passage of a resolution to consolidate by the vote of *three-fourths* of all the stockholders, at a special meeting called for

(1) The directors of the corporations proposing to consolidate enter into an agreement for the consolidation thereof,

the purpose. Louisiana statute relating to consolidation of business corporations (Act of Dec. 12, 1874) requires the assents of the owners of *three-fifths* of the stock.

Maryland. Laws of 1890, ch. 563: Special meeting must be called for the purpose of considering agreement which must be sanctioned by the holders of a *majority* of the stockholders of the companies.

Business corporation law (Stat. 1888, ch. 8, § 39), requires a majority vote also.

Michigan. Public Acts 1899, p. 450: Directors enter into an agreement under corporate seal prescribing terms and conditions and mode of carrying same into effect. Agreement must be submitted to the stockholders of each corporation separately and sanctioned by votes of *majorities* in interest.

Minnesota. G. S. 1894, § 2715: Consolidation may be effected by one corporation acquiring the stocks, bonds, etc., of another.

Articles stating terms of consolidation must be approved by each corporation by a vote of the stockholders owning a majority of the stock.

Ib. § 2718: Directors enter into agreement which is submitted to stockholders of each corporation separately and must be sanctioned by vote of at least *two-thirds* in amount of the stockholders present.

Mississippi. Anno. Code 1892: Consolidation is had by the consent of the railroad commission and upon such terms as the companies may agree upon.

Missouri. R. S. 1899, § 1059: Railroad companies enter into agreement which must be ratified and approved by a *majority* in interest of all the stock held in each company.

Consolidation of business corporations requires assent of *three-fifths* of stockholders. R. S. 1889, § 2786.

Montana. Civil Code 1895, vol. 2, § 911: Agreement for consolidation of railroad companies, entered into under

corporate seals, signed by president and secretaries, containing terms and conditions, must be approved by stockholders at regular or special meeting by a vote of holders of at least *three-fifths* in amount of capital stock. Consolidation of mining companies requires consent of stockholders holding *three-fifths* of stock. Code, § 527.

Nebraska. Comp. Stat. 1901, § 1765, p. 391: Directors enter into agreement stating terms and conditions which is deemed the agreement of the corporations when it has been submitted to the stockholders of each corporation and sanctioned by vote of at least *two-thirds* in amount of stock represented.

Nevada. G. S. 1885, § 874: Manner of consolidation of railroad companies determined by directors. No amalgamation can take place without the written consent of *three-fourths* of stockholders in interest of each company.

Ib. § 1075: "All and any corporations" may consolidate upon the written consent or request of the holders of *three-fourths* of the stock upon terms agreed upon by directors or trustees.

New Jersey. R. R. Law, par. 250 (G. S. 1895, p. 2696): Directors of each corporation agree jointly under corporate seals prescribing terms and conditions. Agreement submitted to stockholders of each corporation at a meeting called separately; vote by ballot and to adopt the agreement, a *majority* of all the votes cast at each of such meetings, is necessary. R. R. Law, par. 281 (G. S. 1895, p. 2703): Directors of the several corporations agree jointly, prescribing terms and conditions, etc.; Agreement submitted to stockholders of each company at a meeting thereof; vote by ballot and will be adopted if *two-thirds* of all the stockholders voting separately favor it.

R. R. Law, par. 312, as amended by ch. 137, p. 235, Laws of 1898: If corporations desire to effect consolidation they may execute and effect it by con-

prescribing the terms and conditions of consolidation, the mode of carrying the same into effect, the name of the new

tract, which contract must be approved by *two-thirds* of the stockholders given in writing or by vote, but consent of legislature must be obtained. The above statutes relate to the consolidation of railroads under different acts. The General Corporation Act of 1896 (§ 105, subdiv. 11) provides that the consolidation agreement of business corporations must be submitted to stockholders, and that vote of *two-thirds* of stock of each company is necessary for its adoption.

New Mexico. Comp. Laws 1897, § 3847: Consolidation agreement must be ratified in writing by stockholders of respective corporations representing *three-fourths* of the subscribed capital stock. (Applies to consolidation authorized in that section).

Ib. § 3893: Stockholders agree upon terms and conditions, and submit them to stockholders of each company at a meeting called separately for that purpose. A vote by ballot taken, and if *two-thirds* of all the votes of all the stockholders shall be for the adoption of the agreement, companies are consolidated. (Applies to *ib.* § 3892).

New York. R. S. 1896 (Birdseye's), Railroad Law § 71: Form of consolidation substantially that stated in text. Approval of stockholders owning *two-thirds* of stock of each corporation is necessary. Business Corp. Law. (amended to 1901) § 9, contains similar provisions.

North Dakota. Rev. Codes 1899, § 2954: Articles stating the terms of consolidation must be approved by each corporation by a vote of the stockholders owning a *majority* of the stock, at a meeting called for the purpose.

Oklahoma. Stat. 1893, ch. 17, § 15, par. 1016: Articles stating the terms of consolidation must be approved by a vote of stockholders holding a *majority* of the stock at annual or special meeting, or by consent of such stockholders in writing.

Ohio. Bates' Anno. Stat. 1787-1902, § 3381: Directors enter into joint agreement under corporate seal prescribing terms, conditions, etc., which must be submitted to stockholders of each company at meeting called for the purpose; vote by ballot, and if *two-thirds* of all the votes cast at meeting be for adoption, the companies may consolidate.

Pennsylvania. Bright, Pur. Dig., 1894, § 108, p. 1801: Directors agree jointly under corporate seal of each corporation, and prescribe terms and conditions. Agreement is submitted to stockholders of each corporation at a meeting called separately; vote by ballot, and if a *majority* of all the votes cast at each of such meetings shall be in favor of the agreement, companies may consolidate. (Applies to p. 1801, § 107, "Consolidation.")

Ib. § 115, p. 1803: Directors agree jointly, prescribe terms, etc. Meeting of each corporation called separately. Agreement submitted to stockholders; vote by ballot. *Two-thirds* of all votes of stockholders required. (Applies to *ib.* § 114, p. 1803.)

See also *ib.* § 126, p. 1805; § 182, p. 1814.

South Carolina. R. S. 1893, § 1616: Directors enter into joint agreement prescribing terms, conditions, etc. Agreement is submitted to stockholders of each corporation at a meeting thereof called separately for that purpose. Vote by ballot. *Majority* of votes of all the stockholders is required. See also *ib.* § 1546.

South Dakota. Anno. Stat. 1901, § 3906: Terms and conditions agreed upon by directors but must be ratified and approved by persons holding or representing a *majority* in amount of the capital stock of each of said companies, at annual or special meeting or by approval in writing of a *majority* in interest of the stockholders of each company.

Tennessee. Code 1896, §§ 1523, 1524:

corporation, the number and names of the directors and other officers, the number and par value of the shares of the capital stock, and the manner of converting the capital stock of the constituent companies into that of the consolidated corporation, with such other details as they may deem necessary to perfect the new organization and the consolidation of the companies.

(2) The agreement of the directors is next submitted to the stockholders of each of the companies at a meeting thereof

Agreement shall be in writing and set forth the terms and conditions. Must be approved by a *majority* of the stockholders of each of the consolidating companies at a regular meeting. (Applies to § 1522, Code 1896, "Consolidation.")

§ 1533: Agreement must be approved by *majority* of the stockholders of each of the consolidating railroads. (Applies to § 1532, Code 1896, "Consolidation.")

Utah. Laws 1901, ch. 26, p. 20, § 6: Agreement must specify whether there shall be a merger of one or more companies into another without creation of new company or a consolidation forming a new consolidated corporation. Agreement must be ratified by stockholders of domestic corporation and also by stockholders of any foreign corporation consolidating, in the manner prescribed by the laws of the jurisdiction where such corporation was organized. *Two-thirds* vote required for consolidation of business corporations. R. S. 1898, § 340.

Washington. Ballinger's Anno. Code and Stat. 1897, § 4304: Articles stating terms of consolidation must be approved by each corporation by a vote of the stockholders owning a *majority* of the stock, at annual or special meeting, or by consent in writing of such stockholders annexed to such articles.

West Virginia. Code 1899 (as amended by acts 1901, 108), ch. 54, § 53: Consolidation may be effected upon terms and conditions agreed upon by stockholders owning a *majority* of the stock in each company so consoli-

dating. (Applies to 1901 Act of "Consolidation." (1)) Directors agree on terms and conditions of consolidation, and to be effective agreement must be ratified by the votes of *two-thirds* in amount of all the stockholders of each of the companies either at annual or special meeting. (Applies to 1901 Act of "Consolidation." (2)) Consolidation may be had upon such terms as Boards of Directors agree upon with the consent of the stockholders owning a *majority* of the stock of each of the corporations interested. (Applies to 1901 Act of "Consolidation." (3))

Wisconsin. Stat. 1898, § 1833 (as amended by Laws 1899, ch. 191): Articles stating the terms of consolidation must be approved by each corporation by a vote of the stockholders holding a *majority* of the stock at annual or special meetings or by the consent in writing of such stockholders.

Wyoming. R. S. 1899, § 3202: Trustees of corporations enter into agreement under corporate seal of each, prescribing the terms and conditions thereof, etc., and all the stockholders in either of such corporations must ratify. (Applies to (A) in 1899 "Consolidation Act.")

§ 3206: Trustees or directors agree upon terms and conditions which must be ratified and approved by a *majority* in amount of the capital stock of each of companies at annual or special meeting or by approval in writing by a *majority* in interest of such stockholders. (Applies to (B) in 1899, "Consolidation Act.")

called for the purpose of taking the same into consideration, after due notice to the respective stockholders.

(3) At the stockholders' meeting the agreement is considered and a vote by ballot taken for its adoption or rejection. If the prescribed proportion of the stock of each company is voted for the adoption of the agreement, then that fact is duly certified to, and the agreement, or a certified copy, thereof, is filed in the office of the Secretary of State, thus completing the consolidation.

In some of the States, as will be observed, the written consent of a majority or other proportion of the stockholders is required instead of their votes at stockholders' meetings. These statutes treat consolidation as being effected by the act of the *directors*, which the stockholders may approve by their individual assents as well as by their votes.

Where the act authorizing consolidation uses general language and does not clearly designate the means by which the result is to be obtained, the method of consolidation is to be determined by the contracting corporations.¹

Statutes of some of the States authorizing the consolidation of corporations provide that they "may consolidate their capital stock" and under such a statute it was said, in a New Jersey case, that the *purchase* by one corporation of substantially the entire capital stock of another for the purpose of consolidation, followed by practical consolidation, would be held in equity to be a consolidation in accordance with the statute.²

§ 53. *When Consolidation is effected.* — As the steps pointed out by the consolidation statute must be taken, in addition to the execution of the agreement, to make a con-

¹ *Dimpfel v. Ohio, etc. R. Co.*, 9 Biss. (U. S.) 127 (1879), (8 Rep. 641).

² *Williamson v. New Jersey Southern R. Co.*, 26 N. J. Eq. 401 (1875): "In fact, the consolidation was actual and complete in all respects. The purchase and sale and delivery of the stock (sixteen-seventeenths of the whole), by virtue of the legislative authority referred to, for the purpose of

consolidation, and the consequent actual, practical and absolute consolidation, completely recognized in all things, will be held in equity to be a consolidation in accordance with the powers of the Acts. If the proceedings are lacking it is not in substance but in form merely; the consolidation has been fully acquiesced in."

solidation effectual, an agreement to consolidate does not work a consolidation. The *status* of the companies is not affected until the consolidation is completed.¹ The precise time when that result takes place is generally prescribed by the statute, and it is usually provided that the corporations shall be consolidated upon filing the agreement of consolidation in the office of the Secretary of State. Under such a statute it has been held that corporations, parties to an agreement to consolidate, continue in the full enjoyment of their franchises and may accept subscriptions to their capital stock until the agreement is filed.²

§ 54. **Construction of Statutes prescribing Mode of Consolidation.** — Under a statute authorizing the consolidation of corporations, upon the written consent of three-fourths in value of the stock of such corporations, the proportion is based upon the number of shares issued and not upon the number authorized;³ and under the same statute it was held that the fact that trustees consented as the legal owners of stock did not affect the validity of a consolidation.⁴

Railway companies consolidating under the Ohio consolidation act, may agree upon the number and amount of shares of the proposed consolidated company, may classify such stock into "common" and "preferred," and may issue a greater or less number of shares than the aggregate of the constituent companies in order to secure a just and equitable division of property between the shareholders of such corporations.⁵

¹ *Shrewsbury, etc. R. Co. v. Stour Valley R. Co.*, 21 Eng. L. & Eq. 628 (1853), 2 De Gex, M. & G. 866.

² *Mansfield, etc. R. Co. v. Brown*, 26 Ohio St. 223 (1875). In *McClure v. Peoples Freight R. Co.*, 90 Pa. St. 269 (1879), where a subscription was made after the agreement for consolidation had been signed, but before it was filed in the office of the secretary of the Commonwealth, it was held that the filing of the agreement in the office of the secretary was not necessary to validate the subscription.

³ *Market St. R. Co. v. Hellman*, 109 Cal. 571 (1895), (42 Pac. Rep. 225).

⁴ *Market St. R. Co. v. Hellman*, 109 Cal. 571 (1895), (42 Pac. Rep. 225).

It has also been held in a suit by a stockholder to enjoin an attempted consolidation that the record of stockholders upon the stock book must determine the persons entitled to vote upon the question of consolidation. *Langan v. Franklyn*, 29 Abb. N. C. 102 (1892), (20 N. Y. Supp. 404.)

⁵ *Burke v. Cleveland, etc. R. Co.*, 22 Weekly Law Bulletin (Ohio), 11 (1889).

A statute authorizing the directors, with the assent of three-fifths of the stockholders of the original corporations, to effect a consolidation, does not authorize them to place stock of non-participating stockholders on an inferior footing to their own nor to transfer the rights of such stockholders to a third person without their consent.¹

A statute² providing that any railroad corporation may consolidate its stock with that of a corporation in an adjoining State "upon such terms as may be agreed upon, in accordance with the laws of the adjoining State," does not require that a meeting of the stockholders of a domestic corporation, for the purpose of acting upon a proposition to consolidate with a corporation of an adjoining State, should be called and conducted in accordance with the laws of such State, but only that the terms of consolidation should not conflict with those laws.³

§ 55. **What Statutory Provisions Conditions Precedent.** When corporations undertake to consolidate, the preliminary steps which the statute points out — in so far as they constitute conditions precedent as distinguished from mere directions — must be taken before the consolidation takes effect and the new company comes into existence. Thus, if the statute requires the consolidation agreement or a certificate of consolidation to be filed with the Secretary of State, until that is done the new corporation does not exist. "The new corporation, deriving its franchises from the State law, cannot act until the State has the requisite evidence of its claim to corporate existence. The statute is the only source of such existence and its conditions are imperative."⁴ Where it appeared, however, that the certificate was deposited with the Secretary of State, it was held that the law would *presume* that it was recorded, and that the Secretary could be com-

¹ *Fee v. New Orleans Gas Light Co.*, 35 La. Ann. 413 (1883).

² *Indiana Rev. Stat.* (1894), § 5257.

³ *Bradford v. Frankfort, etc. R. Co.*, 142 Ind. 383 (1895), (40 N. E. Rep. 741).

⁴ *Peninsular R. Co. v. Tharp*, 28

Mich. 507 (1874). See also *Commonwealth v. Atlantic, etc. R. Co.*, 53 Pa. St. 9 (1866); *Mansfield, etc. R. Co. v. Brown*, 26 Ohio St. 223 (1875); *Mansfield, etc. R. Co. v. Drinker*, 30 Mich. 124 (1874).

pelled, by mandamus, to do any necessary ministerial act in the matter.¹ Where the statute provides for the payment of fees before the consolidation agreement can be filed or recorded the payment of such fees is essential to consolidation.² The consolidation agreement must follow the provisions of the statute, and it has been held that a failure to set forth therein the residences of the directors of the consolidated company, as required by the statute, renders a consolidation invalid when attacked in *quo warranto* proceedings by the State.³ The election of a new board of directors has also been held, under one statute, to constitute a condition precedent to the acquisition, by the consolidated company, of the rights and franchises of the constituent companies.⁴

¹ In *Commonwealth v. Atlantic, etc. R. Co.*, 53 Pa. St. 9 (1866), it was held that:

(a) Filing in the office of the secretary of the Commonwealth the certificate of consolidation of certain railroad companies constituted the one company thus created a legal corporation in Pennsylvania.

(b) In a *quo warranto* against such company "*nul tiel record*" is well replied to a plea that the defendants became a corporation by contract of consolidation under said act.

(c) It being proved that the certificate was deposited with the secretary of the Commonwealth in his office, the presumption is that he filed the same of record and that it remains of record there.

(d) Under a rejoinder that there is such a record with a *prout patet per recordum*, upon inspection of the record and such proof, judgment will be entered for the defendants.

(e) A mandamus will issue, if necessary, to the secretary, to add the date of filing and any other necessary act in the premises.

² *State v. Chicago, etc. R. Co.*, 145 Ind. 229 (1896), (43 N. E. Rep. 226). See also *Ashley v. Ryan*, 49 Ohio St. 504 (1892), (31 N. E. Rep. 721), *affirmed*

153 U. S. 436 (1894), (14 Sup. Ct. Rep. 865).

³ *State v. Vanderbilt*, 37 Ohio St. 645 (1882): "A fatal defect in the organization of this company is found in the fact that under Rev. Stats. § 3381 (Ohio), the directors of the consolidating companies must set forth in their joint agreement the places of residence of the new directors, as well as their number. This provision of the statute has not been complied with. There is no designation of any such place of residence. We are not to speculate as to the propriety of this provision nor as to the manner it became incorporated into the statutes in its present form. It is sufficient to say that the provision is in no sense directory and that a compliance with it is indispensable".

⁴ *Mansfield, etc. R. Co. v. Drinker*, 30 Mich. 126 (1874): "By that law it will be seen that the corporations were not to become merged until the agreement for consolidation was duly filed in the office of the Secretary of State. This was not done until May 23, 1871. Before that time only an inchoate agreement for consolidation existed and no merger; and it was impossible that any action as a consolidated corporation could take place. The circuit judge held that the election of a board

§ 56. What Statutory Provisions not Conditions Precedent. —

A provision in a consolidation act requiring each of the consolidating corporations to file with the Secretary of State a resolution, adopted by the corporation, accepting the provisions of the act before they can consolidate, is directory, and a failure to comply therewith does not affect the consolidation, as between stockholders of a constituent corporation and bondholders of the consolidated company.¹ A statute authorizing the consolidation of a domestic corporation with a corporation of an adjoining State "in accordance with the laws of such State" does not require that all the enactments concerning consolidation in such other State should be strictly followed;² nor are statutory provisions relating to incorporation applicable to foreign corporations consolidating, under legislative authority, with domestic ones.³

The provisions of a general incorporation act requiring directors to be stockholders do not apply to a consolidated corporation formed under a special act containing no such provision.⁴ Where the consolidation act did not require notice to be given to the directors of the meeting of the board to act upon an agreement for consolidation, and it was not shown that the articles of association or by-laws of the company required such notice, the unanimous action of a majority of the directors, being a quorum, at a meeting held, without

of directors was a condition precedent to its acquiring the rights and franchises of the respective companies, and in that he is supported by the unambiguous provisions of the statute itself."

¹ In *Leavenworth v. Chicago, etc. R. Co.*, 134 U. S. 688 (1890), (10 Sup. Ct. Rep. 708), where a provision for filing with the Secretary of State, by each of the consolidating companies, of a resolution accepting the provisions of the act, passed by a majority of the stockholders, at a meeting called for the purpose, was not observed, it was held that its nonobservance did not render the consolidation void. The Court quoted with approval the following language of the Circuit Court: "It is also a provision which may well

be held to be directory, and designed to secure evidence that each of the companies intending to consolidate recognized the statute as the sole authority for such consolidation, and their obligation to be governed by its provisions. If the other essential provisions of the act were complied with, it does not necessarily follow that the whole proceeding would be void for a failure to comply with this direction of the act."

² *Bradford v. Frankfort, etc. R. Co.*, 142 Ind. 383 (1895), (40 N. E. Rep. 741).

³ *Monroe v. Fort Wayne, etc. R. Co.*, 28 Mich. 271 (1873).

⁴ *Camden Safe Deposit, etc. Co. v. Burlington Carpet Co.* (N. J. 1895), 33 Atl. Rep. 479.

notice to all the directors, was held valid.¹ The certification upon the agreement of consolidation by the secretaries of the constituent corporations that it has been adopted by their respective companies is not essential.² A statutory provision requiring notice of consolidation to be published "one month" was held to be complied with by publication in five consecutive issues of a weekly paper and by publication from October 18th to Nov. 17th, inclusive, in a daily paper.³

§ 57. **Statutory Provisions for Appraisal of Stock.** — While a stockholder in a corporation organized while general consolidation statutes are upon the statute book, takes his stock subject to the possibility that the prescribed majority may effect consolidation without his consent, the change is still of a fundamental nature and may materially affect his interests. Recognizing this position of minority stockholders the policy of several States, as indicated in their consolidation acts, is to provide, as a part of the process of consolidation, for the appraisal of, and payment at the appraisal for, the shares of stockholders who are unwilling to participate in the new enterprise.⁴ As said by the Supreme Court of Ohio in *Pittsburg*,

¹ *Wells v. Rodgers*, 60 Mich. 527 (1886), (27 N. W. Rep. 671).

² *Phinizy v. Augusta, etc. R. Co.*, 62 Fed. 684 (1894).

An agreement for the consolidation of two railroad companies which was duly signed and sealed by the president after the meetings of the directors of both companies had been held and the consolidation ordered, was not rendered invalid by the fact that it bore date prior to the meeting of the directors of one company. *Wells v. Rodgers*, 60 Mich. 555 (1886), (27 N. W. Rep. 671).

³ *Market St. R. Co. v. Hellman*, 109 Cal. 571 (1895), (42 Pac. Rep. 225).

⁴ The *Delaware Statute* (Gen. Corp. Law 1899, § 56) applicable in the consolidation of business corporations is illustrative of appraisal statutes: "If any stockholder in either corporation consolidating as aforesaid, who objected thereto in writing, shall within

twenty days after the agreement for consolidation has been filed and recorded as aforesaid, demand in writing from the consolidated corporation payment of his stock, said corporation shall within three months thereafter pay him the value of his stock at the date of such consolidation; in case of disagreement as to the value thereof it shall be ascertained by three disinterested persons, one of whom shall be chosen by the stockholder, one by the directors of the consolidated corporation, and the third by the two selected as aforesaid; and in case the said award shall not be paid within sixty days from the making thereof and notice given to said stockholder and consolidated corporation, the amount of said award shall be evidence of the amount due by said corporation and may be collected as other debts are collectible, and on receiving payment of the award said stockholder shall transfer his stock to the consoli-

*etc. R. Co. v. Garrett.*¹ "From the first statute to the present, authorizing the consolidation of railroad companies in this State, it has been the policy of the legislature to require payment to be made to the stockholder of the value of his stock when he refuses to convert it into the stock of the new company."

dated corporation to be disposed of by the directors thereof or to be retained for the benefit of the remaining stockholders."

See also:

Alabama: Acts 1900-'01, p. 237, amending Code 1896, § 1166 (railroads).

Connecticut: Pub. Acts 1901, ch. 157, § 51. Almost identical with Delaware statute.

Nebraska: Comp. Stat. 1901, § 1764, p. 390 (railroads).

New York: Business Corp. Law as amended to 1899, § 9, is similar to the Connecticut and Delaware statutes except that it provides for the appointment of appraisers by the courts instead of by the parties and that both the stockholder and the consolidated company may apply for their appointment.

In *Langan v. Franklyn*, 20 N. Y. Supp. 404 (1892), it was held that this statute did not afford a dissenting stockholder his exclusive remedy but that he might seek relief in equity.

As to whether stockholder is entitled to interest on appraised value of stock, see *Trask v. Peekskill Plow Works*, 6 Hun (N. Y.), 236 (1875).

New Jersey: Corp. Act 1896, § 108. This act is similar to that of New York in its form of procedure but applied only to such corporations authorized to consolidate as "shall have the

right to exercise any franchise for public use."

Ohio: Anno. Stat. as amended to 1902, § 3388 (railroads). Under this act it is the duty of the railroad company proposing to consolidate to ascertain who, if any, of its stockholders, refuse to convert their stock into stock of the consolidated corporation and to cause the value of the stock of any who refuse to be ascertained and paid "before the consolidation takes effect;" and it was held that a failure to make demand before the proposed consolidated company acquired the status of an incorporated company or a failure to make an attempt to agree with the company as to the value of the stock, did not defeat the right of a stockholder, refusing to convert his stock, to be paid its full value. *Pittsburgh, etc. R. Co. v. Garrett*, 50 Ohio St. 405 (1893), (34 N. E. Rep. 493).

Pennsylvania: Laws 1901, p. 349-352, § 5.

South Carolina: R. S. 1893, § 1622 (railroad companies).

Wyoming: R. S. 1899, § 3022, (railroads).

England: Companies' Clauses Consolidated Act (8 & 9 Vict. ch. 16, §§ 128-134), construed in *Re Anglo Italian Bank*, L. R. 2 Q. B. 452 (1867).

¹ *Pittsburgh, etc. R. Co. v. Garret*, 50 Ohio St. 414 (1893), (34 N. E. Rep. 493).

CHAPTER VI.

EFFECT OF CONSOLIDATION UPON STATUS OF CONSOLIDATING
CORPORATIONS AND THEIR STOCKHOLDERS.

- § 58. Effect of Consolidation may be Fusion, Merger or Continued Existence.
- § 59. Effect of Consolidation depends upon Terms of Consolidation Act.
- § 60. As a General Rule, Effect of Consolidation is Creation of New Corporation and Dissolution of Constituents.
- § 61. Exceptions to the Rule — Merger and Continuance of Corporations.
- § 62. Construction of Particular Consolidation Acts. Cases showing Creation of Distinct Corporation.
- § 63. Construction of Particular Consolidation Acts. Cases of Absorption or Merger.
- § 64. Effect of Valid Consolidation upon Stockholders of Constituent Corporations.

§ 58. **Effect of Consolidation may be Fusion, Merger or Continued Existence.** — As already shown, the term “consolidation” as used in statutes and charters authorizing the union of corporations has acquired no well-defined meaning but is used to describe three forms of corporate conjunction:¹

(1) The dissolution of all the constituent corporations and the creation, at the same instant, in their stead, of a new and distinct corporation, with franchises, privileges and property derived from those passing out of existence.

(2) The merging of one corporation in another, by which the former only is dissolved and the latter continues its existence, with the franchises, privileges and property of the merging corporation added to its own.

(3) The continuance of all the consolidating corporations, for all purposes or for formal purposes connected with the winding up of their affairs.

Consolidating corporations often possess valuable privileges and immunities which the consolidated corporation is desirous of succeeding to, but which the courts, as a rule, do not favor,² so that the question whether the effect of a particular consoli-

¹ See *ante*, § 8: “*Uses of the Term distinguished.*” U. S. 20 (1901), (21 Sup. Ct. Rep. 240); St. Louis etc. R. Co. v. Berry, 113 U. S.

² Yazoo, etc. R. Co. v. Adams, 180 405 (1885), (5 Sup. Ct. Rep. 529).

dation is to dissolve the constituent companies is often of much importance.

§ 59. **Effect of Consolidation depends upon Terms of Consolidation Act.** — The word “consolidation” being applied to different processes producing different results, the effect of a consolidation authorized by statute, upon the existence and *status* of the constituent corporations, depends entirely upon the terms and provisions of such statute and the acts and agreements of the consolidating corporations pursuant thereto.¹

In *People v. New York, etc. R. Co.*² the New York Court of Appeals said: “It is perfectly competent for the legislature, in consolidation acts, to declare what shall be the *status* of domestic corporations which shall avail themselves of their provisions, and also of the consolidated company. Whether the consolidation shall create a mere business union between the constituent companies, leaving them in existence as corporations, or whether it shall operate as a surrender of the corporate franchises and the extinguishment of their corporate existence, and as creating a new corporation combining, to the extent permitted by the act, the powers of the corporations out of which it was formed, and vesting in it the property of the constituent companies, depends upon the legislative intention.”

The Supreme Court of the United States has said that “if in the statutes there be no words of grant of corporate powers it is difficult to see how a new corporation is created. If it is, it must be by implication, and it is an unbending rule that a grant of corporate existence is never implied.”³ Notwithstanding this *dictum*, as controversies concerning the effect of consolidation nearly always arise in cases turning upon the

¹ *Keokuk, etc. R. Co. v. Missouri*, 152 U. S. 305 (1894), (14 Sup. Ct. Rep. 592): “In the numerous cases which have arisen in this court as to the effect of a consolidation upon the existence and status of the constituent corporations it has been held that the question of the dissolution of such corporations depended upon the language of the

statute under which the consolidation took place.”

See also *Yazoo, etc. R. Co. v. Adams*, 180 U. S. 1 (1901), (21 Sup. Ct. Rep. 240); *Railroad Co. v. Georgia*, 98 U. S. 362 (1878).

² *People v. New York, etc. R. Co.*, 129 N. Y. 482 (1892), (29 N. E. Rep. 959).

³ *Central R., etc. Co. v. Georgia*, 92 U. S. 670 (1875).

question whether the consolidated corporation has inherited certain exemptions and immunities from the old companies, not favored by the law, in case the consolidation statute speaks of the consolidated corporation as a "new" corporation, or in any way, even in general terms, indicates an intention to create a new corporation, the courts will not be slow in holding that the effect of the consolidation is to dissolve the old companies and extinguish their special exemptions. "Indeed," says Mr. Justice Brown in a very recent case, "it is not too much to say that courts are astute to seize upon evidence tending to show either that such exemptions were not really intended, or that they have become inoperative by changes in the original constitution of the companies."¹

It is not necessary that the powers of the new corporation should be specially enumerated nor is its *status* affected by reference to the charters of the old companies.²

§ 60. **As a General Rule, Effect of Consolidation is Creation of New Corporation and Dissolution of Constituents.** — One of the earliest decisions upon the subject of the consolidation of corporations was given by the Supreme Court of Indiana, which held in *McMahon v. Morrison*³ that the effect of a consolidation, by legislative authority, was a dissolution of the original corporations and, at the same instant, the creation of a new corporation with property, liabilities and stockholders derived from those passing out of existence. This decision was approved by the Supreme Court of the United States,⁴ and the conclusion there reached has been adopted as ap-

¹ *Yazoo, etc. R. Co. v. Adams*, 180 U. S. 22 (1901), (21 Sup. Ct. Rep. 240).

² *Railroad Co. v. Maine*, 96 U. S. 510 (1877): "The Maine Central Railroad Company was, upon the consolidation of the original companies, a new corporation, as distinct from them as though it had been created before their existence. The fact that the powers, privileges, and immunities which they had possessed were conferred upon the new company, so far as they could be exercised or enjoyed by it, in no respect affected its character as a distinct body.

A new corporation may be as readily created by the union of two or more corporations as by the union of individuals; and its powers and privileges may as well be designated by reference to the charters of other companies as by special enumeration."

See also *Shields v. Ohio*, 95 U. S. 319 (1877).

³ *McMahon v. Morrison*, 16 Ind. 172 (1861), (79 Am. Dec. 418).

⁴ *Clearwater v. Meredith*, 1 Wall. (U. S.), 40 (1863).

plicable to different consolidation statutes in a long line of decisions from many States.¹

As a general rule, therefore, the effect of consolidation is the creation of a new and distinct corporation and the dissolution of the constituent companies. "The general current of authority is to the effect that statutes for the consolidation of domestic corporations are to be treated as acts of incorporation, and that, on consolidation being effected under their provisions, the constituent companies, unless such an intention is excluded by the language of the statute, are deemed to be dissolved, and their powers and faculties to the extent author-

¹ *United States*: *Yazoo, etc. R. Co. v. Adams*, 180 U. S. 1 (1901), (21 Sup. Ct. Rep. 240); *Minneapolis, etc. R. Co. v. Gardner*, 177 U. S. 332 (1900), (20 Sup. Ct. Rep. 656); *Keokuk, etc. R. Co. v. Missouri*, 152 U. S. 301 (1894), (14 Sup. Ct. Rep. 592); *Pullman Palace Car Co. v. Missouri Pac. R. Co.*, 115 U. S. 587 (1885), (6 Sup. Ct. Rep. 194); *Railroad Co. v. Georgia*, 98 U. S. 364 (1878); *Railroad Co. v. Maine*, 96 U. S. 510 (1877); *Shields v. Ohio*, 95 U. S. 320 (1877); *Ridgway Township v. Griswold*, 1 McCrary (U. S.), 151 (1878).

Arkansas: *Zimmer v. State*, 30 Ark. 677 (1875).

Georgia: *Central R., etc. Co. v. State*, 54 Ga. 401 (1875).

Illinois: *Ohio, etc. R. Co. v. People*, 123 Ill. 467 (1888), (14 N. E. Rep. 874).

Indiana: *Eaton, etc. R. Co. v. Hunt*, 20 Ind. 457 (1863); *State v. Bailey*, 16 Ind. 46 (1861), (79 Am. Dec. 46).

Iowa: *Carey v. Cincinnati, etc. R. Co.*, 5 Iowa, 357 (1857).

Louisiana: *Charity Hospital v. New Orleans Gas Light Co.*, 40 La. Ann. 382 (1888), (4 So. Rep. 433); *Fee v. New Orleans Gas Light Co.*, 35 La. Ann. 413 (1883).

Maine: *State v. Maine Central R. Co.*, 66 Me. 488 (1877), affirmed 96 U. S. 510 (1877).

Missouri: *State v. Keokuk, etc. R. Co.*, 99 Mo. 30 (1889), (12 S. W. Rep. 290); *Kinion v. Kansas City, etc. R. Co.*, 39 Mo. App. 382 (1889).

North Carolina: *Cheraw, etc. R. Co. v. Anson*, 88 N. C. 519 (1883).

Ohio: *Shields v. State*, 26 Ohio St. 86 (1875); *State v. Sherman*, 22 Ohio St. 411 (1872).

Pennsylvania: *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 42 (1858), (72 Am. Dec. 685).

South Carolina: *Charlotte, etc. R. Co. v. Gibbes*, 27 S. C. 385 (1887), (4 S. E. Rep. 49).

Tennessee: *Miller v. Lancaster*, 5 Cold. 514 (1868).

Texas: *Indianola R. Co. v. Fryer*, 56 Tex. 609 (1882).

The rule is clearly stated in a note to *McMahon v. Morrison* in 79 Am. Dec. 424: "The effect of consolidation upon former companies, except so far as the contrary may be provided by the statute authorizing consolidation is, as a general rule, to dissolve all the old corporations and to create a new one, assuming the liabilities, and succeeding to the rights of the old companies."

As opposed to these authorities the following extract from the opinion in *Phinzy v. Augusta, etc. R. Co.* 62 Fed. 684 (1894), stands alone: "It must be kept in mind that the consolidation of railroads does not create a new corporation, with powers of its own, distinct from, greater or less than those enjoyed by the consolidating companies separately."

ized become vested in the consolidated company as a new corporation created by the act of consolidation.”¹

While the “property, liabilities and stockholders” of the new corporation may, in the language of *McMahon v. Morrison*, be “derived from those passing out of existence,” the proposition that legislative consent to consolidation has the effect of dissolving the old corporations and creating *eo instanti* a new corporation in their stead, is based upon the theory that the consolidated corporation derives its powers from the act authorizing the consolidation and not from the constituent corporations. As said by Mr. Justice Swayne in *Shields v. Ohio*,² “The new organization took the powers and faculties designated in advance in the acts authorizing the consolidation — no more and no less. It did not acquire anything by mere transmission. It took everything by creation and grant.”

§ 61. **Exceptions to the Rule — Merger and Continuance of Corporations.** — While, as a general rule, the effect of consolidation is the dissolution of the constituent companies, the legislature, by appropriate language, may authorize a consolidation by merger or absorption, in which case the existence of only the merging corporation is terminated.³ In *Chicago, etc. R. Co. v. Ashling*,⁴ the Supreme Court of Illinois said: “The general rule that the consolidation of two or more cor-

¹ *People v. New York, etc. R. Co.* 129 N. Y. 482 (1892), (29 N. E. Rep. 959). (*per Andrews, J.*).

² *Shields v. Ohio*, 95 U. S. 323. (1877).

³ In *Central R., etc. Co. v. Georgia*, 92 U. S. 673 (1875), the Supreme Court of the United States said: “If then this construction of the act be correct (and we cannot doubt that it is), that act contemplated no such union and consolidation of the two companies as should work a surrender of their charters by both of them, and the creation of a new company. At most, it intended a merger of the Macon and Western Railroad Company into the other, a mode of transfer of that com-

pany’s franchise, and property and payment therefor with stock of the Central Company. It is of no importance to the inquiry whether a new corporation was created by the union and consolidation, that the Central acquired under the act new and enlarged powers as well as new stockholders.”

See also *Meyer v. Johnston*, 64 Ala. 603 (1879); *New York Central, etc. R. Co. v. Saratoga, etc. R. Co.*, 39 Barb. (N. Y.) 289 (1861); *Eaton v. Hunt*, 20 Ind. 457 (1863). Also *Philadelphia, etc. R. Co. v. Howard*, 13 How. (U. S.) 333 (1851).

⁴ *Chicago, etc. R. Co. v. Ashling*, 160 Ill. 382 (1896), (43 N. E. Rep. 373).

porations into one creates a new company and works a dissolution of the original corporations forming the consolidated company is subject to exceptions and depends upon the statute under which the consolidation is effected. . . . We see no reason why, under the statutes in question, one corporation may not be consolidated with another under the name of such other, which is continued in existence with enlarged powers, franchises and property rights. It is, in substance, so provided, and such consolidations are frequently made."

Merger, as so authorized, is illustrated by the ordinary case of the absorption by one railroad company, through the interchange of stock, of branches and short connecting roads.

The legislature may also authorize the consolidation of corporations and yet provide for the continued existence of all of them for such formal purposes as may be necessary to wind up their affairs.¹ Indeed, the constituent corporations *may* be continued in existence for all purposes; but this form of consolidation as distinguished from a mere alliance, to which the term consolidation is inappropriately applied, is confined to the consolidation of corporations of different States.²

§ 62. **Construction of Particular Consolidation Acts. Cases Showing Creation of Distinct Corporation.** — Where a Louisiana statute authorized the consolidation of two corporations into

¹ In *Edison Electric Light Co. v. New Haven El. Co.*, 35 Fed. 233 (1888), it was held that, by the consolidation of two corporations, the old corporations did not become extinct, so as not to be unable to wind up their business, but that the assignment of the legal title of a patent in writing to the new corporation, by the president and secretary of one of the old corporations, after the consolidation, in pursuance of a vote of its executive committee passed prior thereto, was sufficient to convey such title.

Bishop v. Brainerd, 28 Conn. 299 (1859): "No question was there made as to the competency of those legislatures to consolidate these corporations

into one, or even to extinguish their original individual existence. In regard to the effect of such a consolidation it does not necessarily follow that it would extinguish, to all intents and purposes, the existence of those corporations. It is possible for them still to subsist for certain purposes notwithstanding they should be thus amalgamated."

See also *Lightner v. Boston, etc. R. Co.*, 1 Lowell (U. S.), 338 (1869); *United States v. Southern Pac. Co.*, 46 Fed. 683 (1891).

² See *post*, § 102: "*Effect of Interstate Consolidation upon Status of Constituent Corporations.*"

“one consolidated company holding and enjoying all the rights” belonging to each, it was held that the consolidated corporation was a new corporation, and that the members of the constituent corporations were transmuted into members of the consolidated company.¹

Under a Maine act, providing that, after filing the consolidation agreement, the corporations making it were “to be consolidated and together to constitute a new corporation,” it was held that the consolidated company was a distinct corporation and that the old companies were dissolved.²

A consolidation effected under a Mississippi charter providing that “all of the companies so consolidating shall be merged into and *become one company*, and the company so formed shall be deemed and held to be a corporation created by the laws of this State” under which two companies agreed to consolidate their stock, take a new name, elect a new board of directors, and that the constituent corporations should cease to do business, created a new corporation.³

An Ohio statute spoke of the consolidated company as the “new corporation;”⁴ a Missouri statute spoke of “one company” and provided for the issue of stock in the “new consolidated company;”⁵ a statute of Arkansas provided that all the property of each company should be taken and deemed to be transferred to the consolidated company “as such new corporation;”⁶ a Missouri consolidation act spoke of the con-

¹ *Fee v. New Orleans Gas Light Co.*, 35 La. Ann. 416 (1883): “The articles of association and the legislative act by authority of which they were executed, evidently present a case of complete and perfect amalgamation, the effect of which was, under American authorities, to terminate the existence of the original corporations, to create a new corporation, to transmute the members of the former into members of the latter, and to operate a transfer of the property rights and liabilities of each old company to the new one.”

See also *New Orleans Gas Light Co. v. Louisiana, etc. Co.*, 11 Fed. 277 (1882), where the same statute was under consideration. Compare, how-

ever, *Citizens St. R. Co. v. Memphis*, 53 Fed. 715 (1893).

² *State v. Maine Central R. Co.*, 66 Me. 488 (1877), affirmed *sub nom. Railroad Co. v. Maine*, 96 U. S. 499 (1877).

³ *Yazoo, etc. R. Co. v. Adams*, 180 U. S. 1 (1901), (21 Sup. Ct. Rep. 240), affirming 77 Miss. 194 (1899), (24 So. Rep. 200).

⁴ *Shields v. Ohio*, 95 U. S. 319 (1877).

⁵ *Pullman Palace Car Co. v. Missouri Pac. R. Co.*, 115 U. S. 587 (1885), (6 Sup. Ct. Rep. 194).

⁶ *St. Louis, etc. R. Co. v. Berry*, 113 U. S. 465 (1885), (5 Sup. Ct. Rep. 529).

solidation as “making one company of the two;”¹ a Georgia statute gave the consolidated company the same name as one of the old companies, and conferred upon it full corporate powers.² In all these cases the Supreme Court of the United States held that new and distinct corporations were created, and that the constituent companies were dissolved.

A general law of New York authorized any railroad company “organized under the laws of this State. . . . to merge and consolidate its capital stock, franchises and property with the capital stock, etc., of any other railroad company, . . .” and provided for the conversion of the stock of the consolidated companies “into that of the new corporation,” and it was held that such consolidation created a new and distinct corporation.³

Consolidation under the California Civil Code, which provides that the consolidation of corporations may be made “in such manner as may be agreed upon by their respective directors,” has been held to make the consolidated corporation “a distinct entity—a new corporation.”⁴ It would seem, however, under such a statute, which involves a legislative delegation of powers, that the effect of a consolidation should depend upon the terms of the agreement actually entered into. A new corporation might or might not be created by such agreement.⁵

§ 63. **Construction of Particular Consolidation Acts. Cases of Absorption or Merger.**—Where, under a Georgia statute, two railroad companies were authorized “to unite and consolidate” their “stocks” and all their “rights, privileges, immunities, property and franchises,” under “the name and charter” of one of the companies through the exchange of shares, it was held by the Supreme Court of the United States that consolidation under this act was not a surrender

¹ *Keokuk, etc. R. Co. v. Missouri*, 61 Hun (N. Y.), 66 (1891), (15 N. Y. 152 U. S. 301 (1894), (14 Sup. Ct. Rep. Supp. 635).

592). See *State v. Keokuk, etc. R. Co.*, 99 Mo. 30 (1889), (12 S. W. Rep. 290).

² *Railroad Co. v. Georgia*, 98 U. S. 359 (1878). See *Atlanta, etc. R. Co. v. State*, 63 Ga. 483 (1879).

³ *People v. New York, etc. R. Co.* 69).

⁴ *Market St. R. Co. v. Hellman*, 109 Cal. 571 (1895), (42 Pac. Rep. 225).

⁵ See *Green County v. Conness*, 109 U. S. 104 (1883), (3 Sup. Ct. Rep.

of the existing charters of the two companies, and did not work the extinction of the absorbing company nor the creation of a new company.¹

A consolidation of two railroad companies under a Missouri statute giving authority to consolidate "upon such terms as may be deemed just and proper" merges the franchise and privileges of each in the new company, so that they continue to exist with respect to the roads thus consolidated.²

Under an Alabama statute it was held that neither the adoption of a new name, sanctioned by legislative authority, nor the legislative grant of new powers, changed the identity of a corporation nor created a new one, and that, consequently, an act authorizing the consolidation of railroad companies "so as to form one consolidated railway company" under a new name did not create a new corporation.³ It has also been held that, under an Illinois consolidation act, one corporation may be consolidated with another under the name of the latter, which is continued in existence with enlarged powers, franchises and property rights.⁴

§ 64. **Effect of Valid Consolidation upon Stockholders of Constituent Corporations.**—As elsewhere shown, when a consolidation is invalid for want of the consent of stockholders, a dissenting stockholder is released from his subscription;⁵ may enjoin the consolidation and may maintain an equitable action against the consolidated corporation for the wrongful appropriation of his interest in the original corporation.⁶

When, however, the consolidation is valid, either because all the stockholders approve or because the approval of only a part of them is necessary, the rights of stockholders of the consolidating corporations are generally determined by pro-

¹ *Central R., etc. Co. v. Georgia*, 92 U. S. 665 (1875). (1879). Compare cases cited in note to § 62.

² *Green County v. Conness*, 109 U. S. 104 (1883), (3 Sup. Ct. Rep. 69). Compare *Market St. R. Co. v. Hellman*, 109 Cal. 571 (1895), (42 Pac. Rep. 225). ⁴ *Chicago, etc. R. Co. v. Ashling*, 160 Ill. 373 (1894), (43 N. E. Rep. 373).

⁵ See ante, § 47: "*Rights and Remedies of Dissenting Subscribers.*"

³ *Meyer v. Johnston*, 64 Ala. 603

⁶ See ante, § 46: "*Rights and Remedies of Dissenting Stockholders.*"

visions in the consolidation act or agreement. It is usually provided that the consolidated corporation shall issue its shares in exchange for the shares of stockholders of the constituent companies and, as already noticed, objecting stockholders sometimes have the right to take the appraised value of their shares in money instead of the new securities.¹ In the absence of such provisions it is the better view, that, by force of the consolidation proceedings under legislative authority, the stockholders of the constituent corporations are *transmuted* into stockholders of the consolidated companies.² The holder of stock in a constituent corporation upon so becoming a stockholder of the consolidated company is entitled to the same proportion of stock in the new company as is secured in the consolidation agreement to his fellow stockholders and may maintain an action against the new company therefor.³ The holder of preferred stock in a constituent corporation has a right of action against the consolidated company, upon a contract of the constituent corporation with its stockholders relating to the payment of dividends upon its preferred stock.⁴

¹ See *ante*, § 57: "*Statutory Provisions for Appraisal of Stock.*"

² *Fee v. New Orleans Gas Light Co.*, 35 La. Ann. 413 (1883); *Ridgway Township v. Griswold*, 1 McCrary (U.S.), 151 (1878); *Copland v. Minong Min. Co.*, 33 Mich. 2 (1875). It has been held, however, that a stockholder in a constituent company, not assenting to a consolidation, does not become a member of the consolidated company. *Gardner v. Hamilton Mut. Ins. Co.*, 33 N. Y. 421 (1865). Also *Philadelphia, etc. R. Co. v. Catawissa R. Co.*, 53 Pa. St. 20 (1866).

³ *Fee v. New Orleans Gas Light Co.*, 35 La. Ann. 413 (1883).

Where, however, a person had subscribed for stock in a Pennsylvania corporation, paying ten per cent upon his subscription, and thereafter the corporation was consolidated with another company upon an agreement that each stockholder of the former company

should be entitled to one share of the consolidated company for two of the old company, and such person then brought an action against the consolidated company to compel the issuance of such new shares to him, it was held that the action should be dismissed; that the plaintiff could not maintain an action against the consolidated company which could not be maintained against the old company, and that he was not entitled to a certificate of full paid stock upon which he had paid but ten per cent. *Babcock v. Schuylkill, etc. R. Co.*, 133 N. Y. 420 (1892), (31 N. E. Rep. 30).

⁴ *Boardman v. Lake Shore, etc. R. Co.*, 84 N. Y. 157 (1881). Compare *Pronty v. Lake Shore, etc. R. Co.*, 52 N. Y. 363 (1873).

Where two railroad companies, in their agreement for consolidation, inserted an article providing for the completion of the route of one of the companies, and the directors of the con-

When the effect of consolidation is to create a new corporation, the liability for the corporate debts, of stockholders of the consolidating corporations who become stockholders in the consolidated company, is determined by the laws in force at the time of consolidation, and exemptions from liability theretofore attaching to such stockholders are lost.¹

CHAPTER VII.

RIGHTS AND POWERS OF CONSOLIDATED CORPORATION.

I. Statutory Transmission of Property, Franchises, and Privileges.

- § 65. General Rule. Legal Presumption.
- § 66. Real Estate and Rights in Streets.
- § 67. Choses in Action.
- § 68. Subscriptions.
- § 69. Enforcement of Subscriber's Obligations. Conditional Subscriptions.
- § 70. Municipal Aid.
- § 71. Constitutional Limitations upon Grants of Privileges and Immunities.
- § 72. Exemptions from Taxation.
- § 73. Special Privileges and Immunities other than Tax Exemptions.

II. Powers.

- § 74. Powers of Consolidated Corporation. In General.
- § 75. Power to issue Mortgage Bonds.
- § 76. Right of Eminent Domain.
- § 77. Miscellaneous Powers.

I. Statutory Transmission of Property, Franchises, and Privileges.

§ 65. General Rule. Legal Presumption. — When consolidation proceedings are completed the consolidated corporation,

solidated company failed to comply with such provisions, it was held that if the duty thus created was owing to all the stockholders, one of the stockholders could not sustain an action against the directors to enforce a compliance therewith; and that if the duty was owing to a class of stockholders having, in respect to the matter, an interest or right distinct from another class, any proceeding to obtain relief for a re-

fusal or neglect on the part of the directors to discharge the duty, must bring before the court not only the directors of the company, but the two classes of stockholders. *Port Clinton R. Co. v. Cleveland, etc R. Co.*, 13 Ohio St. 545 (1862). See also *Lord v. Copper Mines Co.*, 1 H. & Tw. 85 (1848).

¹ The act of Minnesota of March 2, 1881, ch. 113, authorizing the consoli-

according to the usual statutory provision becomes possessed of all the rights, property, privileges and franchises theretofore vested in its constituent companies.¹ As observed by

dation of several railroad companies created a new corporation, upon which it conferred the franchises, exemptions and immunities of the constituent companies; but that did not include an exemption of stockholders in the old companies from the payment of corporate debts, or their liability to pay them.

Minneapolis, etc. R. Co. v. Gardner, 177 U. S. 332 (1900), (20 Sup. Ct. Rep. 656), *affirming* *Gardner v. Minneapolis, etc. R. Co.*, 73 Minn. 517 (1898), (76 N. W. Rep. 282).

¹ The provisions of the New York Consolidation Statute (R. S. 1896 (Birdseye's) Railroad Law, § 72, p 2554), are illustrative: "Upon the consummation of said act of consolidation as aforesaid, all and singular the rights, privileges, exemptions and franchises of each of the corporations, parties to the same, and all the property, real, personal and mixed, and all the debts due on whatever account to either of them, as well as all stock and subscriptions and other things in action belonging to either of them, shall be taken and deemed to be transferred to and vested in such new corporation, without further act or deed; and all claims, demands, property, rights of way and every other interest, shall be as effectually the property of the new corporation as they were of the former corporations, parties to such agreement and act; and the title to all real estate, taken by deed or otherwise, under the laws of this State, vested in either of such corporations, parties to said agreement and act, shall not be deemed to revert or be in any way impaired by reason of this act, or anything done by virtue thereof, but shall be vested in the new corporation by virtue of such act of consolidation."

Other statutory provisions of a similar nature applying to railroads are:

Alabama: Code 1896, § 1166 (as amended by Acts of 1900-01, p. 237), § 1168. § 1151 applies to business corporations.

Arizona: R. S. 1901, § 864, par. 3.

Arkansas: S. & H. Dig. 1894, § 6328.

Colorado: Mills' Anno. Stat. 1891, § 628, p. 688.

Connecticut: G. S. 1888, § 3446; P. A., 1901, ch. 157, § 40 (business corporations).

Delaware: Laws 1901, §§ 60, 91, 123; Laws 1899, §§ 88, 121. Corp. Law 1899, § 55 applies to business corporations.

Idaho: Laws 1901, p. 214.

Kansas: G. S. 1897, ch. 70, § 92.

Kentucky: Stat. 1899, ch. 32, § 770; Stat. 1894, § 556 applies to business corporations.

Louisiana: R. L. 1897 (Art. 39 (1877), p. 50), § 2. La. Act of Dec. 12, 1874, applies to business corporations.

Maryland: § 39a, act of April 7, 1892, supplementing G. L. 1888, ch. 23.

Michigan: P. A. 1899, § 29, p. 451; Comp. Laws 1897, § 30.

Minnesota: G. S. 1894, §§ 2715, 2718, 2720.

Missouri: R. S. 1899, §§ 1059, 1060; Stat. 1889, § 2786 (manfg. companies).

Montana: Civ. Code 1895, § 911. § 527 applies to mining companies.

Nebraska: Comp. Stat. 1901, §§ 1764, 1767.

Nevada: Gen. Stat. 1885, § 1075.

New Hampshire: Pub. Stat. & Session Laws 1901, ch. 156, § 22 p. 503.

New Jersey: Railroad Law, § 1, par. 249 (G. S. 1895, p. 2696 *et seq.*); § 3, pars. 251, 282; § 4, par. 283. Corporation Law, § 106, applies to business corporations.

New Mexico: Comp. Laws 1897, §§ 3847, 3895.

New York: Business Corp. Law (amended to 1900), § 10.

Judge Holmes, in *John Hancock, etc. Ins. Co. v. Worcester, etc. R. Co.*:¹ "It is usual for consolidating statutes to introduce more or less of the element of succession, or continuity of legal person as to existing rights and duties notwithstanding the fact that in other respects the old and new corporations are not the same. . . . It is for the legislature to say how far the new corporation shall be, as it were, the heir, executor or continuer of the old."

Where, however, the consolidation statute is silent the general rule, based upon the *presumed* intention of the legislature, is the same — that the consolidated corporation succeeds to all the privileges and franchises of each of the constituent corporations with respect to the property acquired from such corporation.² "The presumption is, until the contrary appears, that the united or consolidated company has all the powers and privileges, and is subject to all the restrictions and liabilities, of those out of which it was created."³

North Dakota: Rev. Codes 1899, § 2954.

Oklahoma: Stat. 1893, ch. 17, § 15, par. 1016.

Ohio: Bates' Anno. Stat. 1902, §§ 3382, 3384.

Pennsylvania: Bright. Purd. Dig. 1894, p. 1801, §§ 109, 110, 113; p. 1803, § 116; p. 1814, § 182.

South Carolina: § R. S. 1893, § 1617.

South Dakota: Anno. Stat. 1901, § 3906.

Tennessee: Code 1896, § 1527.

Utah: R. S. 1898, § 341 (business corporations).

Washington: Ballinger's Anno. Code 1897, § 4304.

Wisconsin: Laws 1899, ch. 191, amending § 1833, Stat. of 1898.

Wyoming: R. S. 1899, § 3202.

England: Railway Clauses Act 1863 (26 and 27 Vict. ch. 92, §§ 38-44).

¹ *John Hancock, etc. Ins. Co. v. Worcester, etc. R. Co.* 149 Mass. 220 (1889), (21 N. E. Rep. 364).

² *United States*: *Keokuk, etc. R. Co. v. Missouri*, 152 U. S. 305 (1894), (14 Sup. Ct. Rep. 592); *Green County v. Conness*, 109 U. S. 104 (1883), (3 Sup.

Ct. Rep. 69); *Central R., etc. Co. v. Georgia*, 92 U. S. 665 (1875); *Tomlinson v. Branch*, 15 Wall. 460 (1872); *Lewis v. Clarendon*, 6 Rep. 609 (1878); *Ridgway Township v. Griswold*, 1 McCrary, 151 (1878); *McAlpine v. Union Pac. R. Co.* 23 Fed. 168 (1885).

Arkansas: *Zimmer v. State*, 30 Ark. 677 (1875).

Georgia: *Montgomery, etc. R. Co. v. Boring*, 51 Ga. 582 (1874); *Selma, etc. R. Co. v. Harbin*, 40 Ga. 706 (1870).

Illinois: *Chicago, etc. R. Co. v. Moffitt*, 75 Ill. 524 (1874); *Robertson v. Rockford*, 21 Ill. 451 (1859).

Indiana: *Louisville, etc. R. Co. v. Boney*, 117 Ind. 501 (1888), (20 N. E. Rep. 432); *Paine v. Lake Erie, etc. R. Co.*; 31 Ind. 283 (1869).

Massachusetts: *Abbott v. New York, etc., R. Co.* 145 Mass. 453 (1888), (15 N. E. Rep. 91).

Missouri: *Thompson v. Abbott*, 61 Mo. 176 (1875).

Tennessee: *Miller v. Lancaster*, 5 Cold. 514 (1868).

³ *Tennessee v. Whitworth*, 117 U. S.

Generally, the consolidation act confers upon the consolidated corporation all the powers and privileges of its constituents,¹ although it was held under a Maine statute providing that the new corporation should "have the powers, privileges and immunities of each of the corporations," that it acquired the privileges and immunities which *all* the constituent companies had, and did not acquire those special powers, privileges and immunities which some had and which some did not have.²

§ 66. **Real Estate and Rights in Streets.** — When consolidation is completed the real estate of the consolidating corporations vests in the consolidated corporation,³ generally "without any other deed or act of transfer,"⁴ and this rule

147 (1886), (6 Sup. Ct. Rep. 649), *per* Waite, C. J.

In *Green County v. Conness*, 109 U. S. 106 (1883), (3 Sup. Ct. Rep. 69) the Supreme Court also said: "When the companies are authorized to consolidate their roads, it is to be presumed that the privileges of each continue to exist in respect to the several roads so consolidated."

See also *Keokuk, etc. R. Co. v. Missouri*, 152 U. S. 305 (1894), (14 Sup. Ct. Rep. 592).

The consolidation of the property and franchises of different companies by their own act does not enlarge the franchises, powers or privileges of the original companies. The new company takes the rights and privileges it acquired by the consolidation, subject to the original conditions and limitations.

Consolidated Traction Co. v. Elizabeth, 58 N. J. L. 619 (1896), (34 Atl. Rep. 146); *Wilbur v. Trenton Pass. R. Co.*, 57 N. J. L. 212 (1894), (31 Atl. Rep. 238).

See also *Tomlinson v. Branch*, 15 Wall (U. S.) 460 (1872).

¹ *Boston, etc. R. Corp. v. Midland R. Co.*, 1 Gray (Mass.), 359 (1854): "By these proceedings, thus ratified, the consolidated corporation succeeded to and became entitled to exercise all the powers and privileges, and subject

to the duties and obligations, of each of the three corporations, as they then stood, and as they were respectively affected by their several acts of incorporation, and by the acts done, the obligations incurred and property held under them."

² *State v. Maine Central R. Co.*, 66 Me. 488 (1877) (affirmed *sub nom.* *Railroad Co. v. Maine*, 96 U. S. 499 (1877)), where it was held: Where a new corporation is formed out of two or more previously existing corporations and by the act creating it is to "have the powers, privileges and immunities possessed by each of the corporations" whose union constitutes such new corporation, the new corporation will have the "privileges, powers and immunities," which they all (*i. e.* every one of them all) had, and it will not have those special powers, privileges and immunities which some had and some did not have.

³ *Cashman v. Brownlee*, 128 Ind. 266 (1890) (27 N. E. Rep. 560); *Tarpey v. Deseret Salt Co.*, 5 Utah, 494 (1888), (17 Pac. Rep. 631).

⁴ A large number of consolidation acts provide that the effects of the consolidating corporations shall vest in the new company by virtue of the consolidation proceedings, "without any other deed or act of transfer."

applies in the case of successive consolidations. Thus where land was conveyed in fee simple to a corporation and afterwards that company was consolidated with another and further consolidations took place from time to time, it was held that the new companies formed by the successive consolidations succeeded to the real estate.¹

Under an act providing that a consolidated street railway company should have all the franchises, and be subject to all the duties of its constituents, the right of a constituent corporation to occupy with its tracks the streets of a city passed to the consolidated company.² It has also been held that the franchises of several street railway companies, contained in their irrepealable charters, to use the streets of a city were not subjected to the liability of legislative repeal by their consolidation, although at the time of consolidation a reserved power to amend or repeal charters was upon the statute book.³

§ 67. *Choses in Action*. — Consolidation statutes generally provide that all *choses in action* of the constituent companies shall, upon consolidation, pass to the consolidated corporation. Without specific designation, they would pass with the other effects of the companies.⁴ Thus a consolidated company succeeds to the right to use patents under a license granted to a constituent corporation.⁵ An indemnity bond given to a constituent corporation enures to the benefit of the consolidated company and the sureties thereon are liable for breaches taking place both before⁶ and after the consolidation.⁷ The vest-

¹ *Cashman v. Brownlee*, 128 Ind. 266 (1890), (27 N. E. Rep. 560).

² *Africa v. Knoxville*, 70 Fed. 729 (1895). See also *Pittsburgh, etc. R. Co. v. Reich*, 101 Ill. 157 (1881).

³ *Citizens St. R. Co. v. Memphis*, 53 Fed. 715 (1893). Judge Hammond placed his decision in this case upon the ground that the consolidation act did not evidence a legislative intention to create a new and distinct corporation and make the charters subject to repeal. Compare *Railroad Co. v. Georgia* 98 U. S. 359 (1878).

⁴ Under the act of Congress authorizing the consolidation of the Kansas

Pacific Railroad with the Union Pacific Railroad it was held that the pre-existing agreements of the former with the government remained unchanged as to compensation for services performed either before or after the consolidation. *The Pacific R. R. Cases*, 16 Ct. of Claims, 354 (1880).

⁵ *Lightner v. Boston, etc. R. Co.* 1 Lowell (U. S.) 338 (1869).

⁶ *London, etc. R. Co. v. Goodwin*, 6 Eng. Ry. Cas. 177 (1849); 3 Exch. Rep. 320.

⁷ *Pennsylvania, etc. R. Co. v. Harkins*, 149 Pa. St. 121 (1892), (24 Atl. Rep. 175); *Eastern Union R. Co. v.*

ing of *choses in action* of a constituent corporation in the consolidated company by a consolidation act which substitutes it for the original corporation, without prejudice to the other party, passes the right to the new corporation, without express grant, to sue thereon in its own name.¹

The general rule that *choses in action* of constituent companies enure to the benefit of the consolidated corporation is, however, inapplicable to contracts which, from their nature, can be carried out by the constituent corporation alone.² Thus where a railroad company agreed to give its bonds, in consideration of certain moneys to be paid in instalments, and afterwards, by legislative authority, becoming consolidated with other companies, bonds of the consolidated company were tendered and suit brought for the money, it was held that such suit would not lie, the consideration offered not being that agreed upon. The Court said: "Neither the court nor the legislature can alter the bargain between these parties. The defendant had the right to stipulate for bonds of a particular company, and it is clear that he cannot be compelled to accept, in lieu of the promised consideration, the obligations of any other company. . . . The consolidated companies, in the nature of things, cannot be the same as one of their constituents. Such a company has larger purposes, wider powers and heavier responsibilities than those inherent in either of its component parts."³

§ 68. **Subscriptions.** — Contracts of subscription for stock in a constituent corporation, upon which there is an existing liability, enure, with other *choses in action*, to the benefit of the consolidated corporation, and it may enforce the obligation of the subscriber, provided the consolidation proceedings are binding upon him.⁴

Cochrane, 24 Eng. L. & Eq. 495 (1853), also Union Pac. R. Co. v. Gochenour, 17 Jur. 1103, 23 L. J. Rep. (N. S.) 56 Kan. 543 (1896), (43 Pac. Rep. Exch. 61. See also Miller v. Lancaster, 5 Coldw. (Tenn.) 514 (1868). 1135).

¹ University of Vermont v. Baxter, 42 Vt. 99 (1869); Miller v. Lancaster, 5 Coldw. (Tenn.) 514 (1868).

² New Jersey Midland R. Co. v. Strait, 35 N. J. L. 322 (1872).

³ New Jersey Midland R. Co. v. Strait, 35 N. J. L. 322 (1872). See

⁴ Wells v. Rodgers, 60 Mich. 525 (1886), (27 N. W. Rep. 671); Cooper v. Shropshire Union R., etc. Co., 13 Jur. 443 (1849), 6 Eng. Railw. Cas. 136

When authority to consolidate is contained in the original charters or is authorized by an act in force at the time of the subscription, the provisions of the statutes enter into and form a part of the contract of subscription, and, in case of consolidation, a subscriber is not released from his subscription, and cannot withdraw from the venture.¹ A subscriber is also bound by consolidation proceedings authorized by the legislature in the exercise of its reserved power.²

(1849). See also *Ridgway Township v. Griswold*, 1 McCrary (U. S.), 151 (1878).

¹ In *Nugent v. Supervisors*, 19 Wall. (U. S.) 249 (1873), the Supreme Court of the United States said: "It was therefore, contemplated by the legislature, as it must have been by all the subscribers to the stock of the company, that precisely what has occurred might occur. Subscribers must be presumed to have known the law of the State and to have contracted in view of it. When the voters of the County of Putnam sanctioned a county subscription by their vote, and when the board of supervisors, in pursuance of that section, resolved to make the subscription, they were informed by the law of the State that a consolidation with another company might be made; that the stock they proposed to subscribe might be converted into stock of the consolidated company, and that the liability they assumed might become owing to that company. With this knowledge and in view of such contingencies they made the contract. The consolidation, therefore, wrought no change in the organization or design of the company to which they subscribed other than they contemplated at the time as possible and legitimate. It cannot be said that any motive for their subscription has been taken away, or that the consideration for it has failed. Hence the reason of the general rule we have conceded does not exist in this case, and, consequently, the rule is inapplicable. In a multitude of cases decided in England and in this

country it has been determined that a subscriber for the stock of a company is not released from his engagement to take it and pay for it by any alteration of the organization or purposes of the company which, at the time the subscription was made, were authorized either by the general law or by special charter, and a clear distinction is recognized between the effect of such alterations and the effect of those made under legislation subsequent to the contract of subscription."

See also:

Connecticut: *Bishop v. Brainerd*, 28 Conn. 289 (1859).

Delaware: *Delaware R. Co. v. Tharp*, 1 Houst. 149 (1866).

Illinois: *Terre Haute, etc. R. Co. v. Earp*, 21 Ill. 291 (1859); *Sprague v. Illinois River R. Co.*, 19 Ill. 174 (1857).

Indiana: *Sparrow v. Evansville, etc. R. Co.*, 7 Ind. 369 (1856); *Bish v. Johnson*, 21 Ind. 299 (1863).

Kentucky: *Fry v. Lexington, etc. R. Co.*, 2 Metc. 314 (1859).

Missouri: *Pacific R. Co. v. Renshaw*, 18 Mo. 210 (1853).

Ohio: *Mansfield, etc. R. Co. v. Brown*, 26 Ohio St. 223 (1875).

Pennsylvania: *Hamilton v. Clarion, etc. R. Co.*, 144 Pa. St. 34 (1891), (23 Atl. Rep. 53).

Compare *Cork, etc. R. Co. v. Patterson*, 18 C. B. 414 (1856), (37 Eng. L. & Eq. 398); *Kenosha, etc. R. Co. v. Marsh*, 17 Wis. 13 (1863).

² See cases cited in preceding note. Also *ante*, § 43: "*Requisite Number of Stockholders—(C) Under Enactments in Exercise of Reserved Power.*"

§ 69. **Enforcement of Subscriber's Obligations. Conditional Subscriptions.** — The consolidated corporation may, in its own name, enforce the liability of subscribers to stock by appropriate actions,¹ but it cannot maintain such actions until all the statutory conditions precedent to consolidation have been complied with and it has acquired a distinct corporate existence.² Thus, it has been held, under the requirements of different statutes, that no such action can be maintained until the consolidated company has elected a new board of directors,³ or filed its certificate of consolidation with the Secretary of State.⁴ In such an action to enforce an obligation upon a contract made with another corporation it is necessary for the consolidated corporation to show that it has, and in what manner it has, succeeded to the rights of the original company upon such contract.⁵ Proof of the existence of the consolidated company as a corporation *de facto* is not enough. "It may be a corporation *de facto* and entitled, as such, to enforce contracts as against parties who have dealt with it, without at the same time in any manner having succeeded to the rights of the . . . company with which the contract of the defendant was made."⁶ Transfer by *assignment* or transfer by *succession* must be shown.⁷

If a subscription to the stock of a constituent corporation is made upon condition, it passes to the consolidated com-

¹ As subscription obligations, with other *choses in action*, pass directly to the consolidated corporation by virtue of the consolidation agreement and proceedings thereunder, an additional formal assignment is unnecessary, but such assignment is sometimes delivered and is convenient in case of suit, in obviating the necessity for proving the fact of consolidation.

² *Midland R. Co. v. Leech*, 3 H. L. Cas. 872 (1852); *Mansfield, etc. R. Co. v. Brown*, 26 Ohio St. 223 (1875); *Rodgers v. Wells*, 44 Mich. 411 (1880), (6 N. W. Rep. 860).

³ *Peninsular R. Co. v. Tharp*, 28 Mich. 506 (1874).

⁴ *Mansfield, etc. R. Co. v. Brown*, 26 Ohio St. 223 (1875).

⁵ *Mansfield, etc. R. Co. v. Drinker*, 30 Mich. 124 (1874).

⁶ *Mansfield, etc. R. Co. v. Drinker*, 30 Mich. 124 (1874). See also *Tuttle v. Michigan Air Line Co.*, 35 Mich. 249 (1877); *Mansfield, etc. R. Co. v. Brown*, 26 Ohio St. 223 (1875); *Peninsular R. Co. v. Tharp*, 28 Mich. 506 (1874); *Brown v. Dibble*, 65 Mich. 520 (1887), (32 N. W. Rep. 656).

⁷ An assignee of a consolidated corporation of a claim upon a stock subscription of a constituent company must, likewise, fail in his action to collect the same if he does not show the observance of the statutory conditions to consolidation. *Rodgers v. Wells*, 44 Mich. 411 (1880), (6 N. W. Rep. 860).

pany subject thereto and that corporation must perform the condition before it can maintain any action upon the subscription. A consolidated corporation may also, by the performance of conditions, accept a continuing conditional offer to subscribe for the stock of one of its constituent companies.¹ Thus, for example, a condition in a subscription to the capital stock of a railroad company that its railroad should pass through a certain place might, upon its consolidation, be complied with by the consolidated company; and the subscription would become absolute on the location of the road through the place named.²

Calls or requisitions for the payment of subscriptions in instalments, made during the pendency of consolidation proceedings, continue in force, after consolidation, for the benefit of the consolidated company. Such requisitions apply not only to subscriptions absolute at the date of the call but to conditional subscriptions, as soon as the conditions are performed.³

While, generally, consolidation terminates the existence of consolidating corporations so that they cannot thereafter maintain actions,⁴ it was held that a constituent corporation might bring an action after consolidation against a subscriber upon his contract of subscription,⁵ which could be maintained, unless the fact of consolidation were pleaded in abatement.⁶ Upon principle, however, it would seem that the dissolution of the plaintiff corporation might be suggested upon the record at any time.

¹ *Mansfield, etc. R. Co. v. Pettis*, 26 Ohio St. 259 (1875).

² *Mansfield, etc. R. Co. v. Stout*, 26 Ohio St. 241 (1875).

Where a subscription was based on a corporation's locating its road at a certain point, but the road was not built by that company, but by a new company consolidated with one organized on foreclosure of the first company's property and franchise, it was held that the subscription was lacking in consideration, and could not be enforced by

the consolidated company. *Dix v. Shaver*, 14 Hun (N. Y.), 392 (1878).

³ *Mansfield, etc. R. Co. v. Stout*, 26 Ohio St. 241 (1875).

⁴ *Pennsylvania College Cases*, 13 Wall. (U. S.) 215 (1871): "Neither of the original corporations is competent to sue for any cause of action subsequent in date to their acceptance of the new act of incorporation."

⁵ *Hanna v. Cincinnati, etc. R. Co.*, 20 Ind. 30 (1863).

⁶ *Swartwout v. Mich. Air Line R. Co.*, 24 Mich. 403 (1872).

§ 70. **Municipal Aid.**—Counties and towns through which they ran furnished the principal means by which the early railroads in the Western States were constructed. The policy of rendering such aid was in accordance with the public sentiment of the period.¹ Aid was usually rendered through subscriptions to stock and payment therefor in municipal bonds, but donations were not uncommon and stand upon the same legal basis as subscriptions.²

Upon consolidation the subscription contracts of municipal corporations pass to the consolidated company in the same manner as other subscriptions and it succeeds to their rights to receive municipal aid.³ The power given by the legislature

¹ In *Scotland County v. Thomas*, 94 U. S. 693 (1876), Mr. Justice Bradley said: "The project of the railroad promised a great public improvement, conducive to the interests of Alexandria and the counties through which it would pass. Its construction, however, would greatly depend upon the local aid and encouragement it might receive. The interests of its projectors and of the country it was to traverse were regarded as mutual. The power of the adjacent counties and towns to subscribe to its stock, as a means of securing its construction, was desired not only by the company, but by the inhabitants. Whether the policy was a wise one or not is not now the question. It was in accordance with the public sentiment of that period. The power was sought at the hands of the legislature, and was given. It was relied on by those who subscribed their private funds to the enterprise. It was involved in the general scheme as an integral part of it, and as much contributory and necessary to its success as the prospective right to take tolls. Why it should not still attach to this portion of the road, as one of the rights and privileges belonging to it, into whose hands soever it comes, by consolidation or otherwise, it is difficult to see."

² *Railroad Co. v. County of Otoe*, 16 Wall. (U. S.) 675 (1872): "It is urged, however, against the validity of the act

now under consideration, that it authorized a donation of the county bonds to the railroad company, and it is insisted that if even the legislature could empower the county to subscribe to the stock of such a corporation, it could not constitutionally authorize a donation. Yet there is no solid ground of distinction between a subscription to stock and an appropriation of money or credit. Both are for the purpose of aiding in the construction of the road; both are aimed at the same object, securing a public advantage, obtaining a highway or an avenue to the markets of the country; both may be equally burdensome to the taxpayers of the county. The stock subscribed for may be worthless, and known to be so." See also *New Buffalo v. Iron Co.*, 105 U. S. 73 (1881).

³ *United States v. Livingston County v. First Nat. Bank*, 128 U. S. 102 (1888), (9 Sup. Ct. Rep. 18); *Bates County v. Winters*, 112 U. S. 325 (1884), (5 Sup. Ct. Rep. 157); *New Buffalo v. Iron Co.*, 105 U. S. 73 (1881); *Harter v. Kernochan*, 103 U. S. 562 (1880); *Menesha v. Hazard*, 102 U. S. 81 (1880); *Empire Township v. Darlington*, 101 U. S. 87 (1879); *Henry County v. Nicolay*, 95 U. S. 619 (1877); *East Lincoln v. Davenport*, 94 U. S. 801 (1876); *Callaway County v. Foster*, 93 U. S. 567 (1876); *Scotland County v. Thomas*, 94 U. S. 682 (1876); *Nugent v. Supervisors*, 19 Wall. (U. S.), 241 (1873); *Washburn v. Cass County*,

to a municipal corporation to make a donation in aid of the construction of a railroad is itself a privilege of the railroad corporation, and passes, with other rights and privileges, upon consolidation, to the new company.¹ Where, however, before a consolidation was effected, a constitutional provision had been adopted prohibiting county subscriptions without the vote of the people, it was held that the consolidated corporation did not acquire the right of constituent corporations to receive such aid without such vote.²

A discussion of the right of consolidated companies to receive municipal aid voted to their constituents is, principally, of historic value. Public sentiment has changed. Public policy as indicated by constitutional and statutory provisions is adverse to municipal aid to railroad companies, and, only in exceptional instances, is such aid granted at the present time.

3 Dill (U. S.), 251 (1875); *Lewis v. Clarendon*, 6 Rep. 609 (1878).

Illinois: *Edwards v. People*, 88 Ill. 340 (1878); *Robertson v. Rockford*, 21 Ill. 451 (1859); *Niantic Savings Bank v. Douglass*, 5 Ill. App. 579 (1879).

Indiana: *Scott v. Hanshear*, 94 Ind. 1 (1883).

Kansas: *Atchison, etc., R. Co. v. Phillips County*, 25 Kan. 261 (1881); *Chicago, etc. R. Co. v. Stafford County*, 36 Kan. 121 (1887), (12 Pacific Rep. 593).

Missouri: *State v. Greene County*, 54 Mo. 540 (1874); *Smith v. Clark County*, 54 Mo. 58 (1873); *Hannibal, etc. R. Co. v. Marion County*, 36 Mo. 294 (1865).

Texas: *Morrell v. Smith County*, 89 Tex. 529 (1896), (36 S. W. Rep. 56).

¹ *Harter v. Kernochan*, 103 U. S. 574 (1880): "The act . . . fully authorized the consolidation between those two companies, and upon such consolidation the new company succeeded to all the rights, franchises and powers of the constituent companies. The power in the township to make a donation in aid of the construction of the Illinois

Southeastern railway was also a privilege of the latter corporation, and that privilege, upon the consolidation, passed to the new company."

See also *Smith v. Clark County*, 54 Mo. 67 (1873), followed in *Scotland County v. Thomas*, 94 U. S. 682 (1876), and cases cited in preceding note.

² *Wagner v. Meety*, 69 Mo. 150 (1878).

In *Harshman v. Bates County*, 92 U. S. 569 (1875), the Supreme Court of the United States held where authority had been given to a county court by the electors of a township to subscribe, in its behalf, for stock in a certain railroad company that, upon principles of the law of attorney and constituent, the consolidation of such company with another revoked the power.

In *Wilson v. Salamanca*, 99 U. S. 499 (1878), however, the Court distinguished the above case from a case where a subscription had been made under similar conditions by a township trustee and clerk, holding that they acted in their official capacity as township authorities and not as mere agents, and that the township was liable.

§ 71. **Constitutional Limitations upon Grants of Privileges and Immunities.** — Constitutional provisions in many States prohibit the grant of special privileges and immunities.

When consolidation takes the form of merger these provisions are inapplicable, for the privileges and exemptions of the merging companies pass to an *existing* corporation, which takes by transfer and not by grant.¹

When, however, the effect of consolidation is to dissolve the consolidating companies and to create in their stead a new and distinct corporation this new corporation takes everything by grant — express or by reference — and the legislature is controlled by existing constitutional limitations in granting it privileges.² The new consolidated corporation is subject to all constitutional provisions in force at the time of its creation in precisely the same manner as other new corporations. Where corporations enjoying irrepealable privileges and exemptions consolidate and a new corporation is created it takes such privileges subject to constitutional or statutory provisions reserving to the legislature power to repeal the charter provisions granting them.³

Questions as to the effect of constitutional provisions upon the special immunities of consolidating corporations generally arise in connection with exemptions from taxation and are further considered in the next section.

§ 72. **Exemptions from Taxation.** — As already indicated, the purpose of acts permitting the merger of corporations is, generally, to vest in the absorbing company the privileges and immunities, including exemptions from taxation, of the com-

¹ *Tennessee v. Whitworth*, 117 U. S. 147 (1885), (6 Sup. Ct. Rep. 649); *Central R., etc. Co. v. Georgia*, 92 U. S. 665 (1875); *Southwestern R., etc. Co. v. Georgia*, 92 U. S. 676, note (1875). Compare *Zimmer v. State*, 30 Ark. 677 (1875).

² *Yazoo, etc. R. Co. v. Adams*, 180 U. S. 1 (1901), (21 Sup. Ct. Rep. 240); *Minneapolis, etc. R. Co. v. Gardner*, 177 U. S. 332 (1900), (20 Sup. Ct. Rep. 656); *Norfolk, etc. R. Co. v. Pendleton*, 156 U. S. 673 (1895), (15 Sup. Ct. Rep.

413); *St. Louis, etc. R. Co. v. Berry*, 113 U. S. 465 (1885), (5 Sup. Ct. Rep. 529); *Railroad Co. v. Georgia*, 98 U. S. 359 (1878); *Railroad Co. v. Maine*, 96 U. S. 499 (1877); *Shields v. Ohio*, 95 U. S. 319 (1877); *Keokuk, etc. R. Co. v. Scotland County*, 41 Fed. 305 (1890).

³ *Railroad Co. v. Georgia*, 98 U. S. 359 (1878). See also cases cited in note

2. Compare *Citizens' Street R. Co. v. Memphis*, 53 Fed. 715 (1893). See *ante*, § 66: "*Real Estate and Rights in Streets.*"

panies absorbed, and such is the legal presumption.¹ The merger does not, however, enlarge the rights acquired nor bestow new immunities.² Thus, where one railroad corporation which enjoyed an exemption from taxation for a limited period was merged in another company having a perpetual exemption, it was held that such perpetual exemption did not apply to the railroad of the absorbed company, and that it became subject to taxation upon the expiration of the period limited.³

When a new corporation is created as the result of consolidation the question whether it acquires the exemptions from taxation enjoyed by its constituent companies depends upon the constitution of the State and the terms of the consolidation act. If the constitution prohibits the grant of such exemptions they cannot, as shown in the last section, be bestowed on the consolidated company.⁴

¹ *Tennessee v. Whitworth*, 117 U. S. 147 (1885), (6 Sup. Ct. Rep. 649).

² *Central R., etc. Co. v. Georgia*, 92 U. S. 675 (1875). "The obvious purpose of the act was to vest in the Central Company the rights, privileges, immunities, property, and franchises which had belonged to the Macon and Western Company; not to enlarge those rights, or to bestow new immunities. If, therefore, the Macon and Western held its franchises and property subject to taxation, the Central, succeeding to the franchises and property, holds them alike subject. It took them just as they were, acquiring no additional or enlarged rights as against the State."

See also *Southwestern R., etc. Co. v. Georgia*, 92 U. S. 676 (1875), in note to above case. Also *Keokuk, etc. R. Co. v. Missouri*, 152 U. S. 301 (1894), (14 Sup. Ct. Rep. 592); *State v. Philadelphia, etc. R. Co.*, 45 Md. 361 (1876), (24 Am. Rep. 511).

³ *Tomlinson v. Branch*, 15 Wall. (U. S.) 460 (1872).

⁴ In *St. Louis, etc. R. Co. v. Berry*, 113 U. S. 465 (1885), (5 Sup. Ct. Rep. 529), it was held: A consolidation of two railway companies by an agree-

ment which provided that all the property of each company should be taken and deemed to be transferred to the consolidated company "as such new corporation without further act or deed," created a new corporation, with an existence dating from the time when the consolidation took effect, and subject to constitutional provisions respecting taxation in force in the State at that time.

In *Keokuk, etc. R. Co. v. Scotland County*, 41 Fed. 305 (1890), the Court said that a consolidation of two railroad companies under the Missouri consolidation act operated as the creation of a new corporation, wholly distinct from the constituent corporations out of which it was formed, which new corporation derived its powers and franchises from the consolidation act; and since Const. Mo. 1865, Art. 11, par. 16, prohibiting legislative exemption from taxation, was adopted before the passage of the act, the consolidated corporation did not acquire the immunity from taxation granted in 1857 to one of its constituent corporations.

See also cases cited in notes to preceding section.

Where the constitution contains no prohibition of such exemptions, their existence depends entirely upon the provisions of the consolidation act. The courts view such exemptions with disfavor and, in construing consolidation statutes, hold that, in the absence of an express statutory direction or of an equivalent implication by necessary construction, exemptions from taxation in the charters of consolidating corporations do not pass to the new corporation succeeding, by consolidation, to their property and ordinary franchises.¹

In the recent case of *Yazoo, etc. R. Co. v. Adams*² Mr. Justice Brown said: "Exemptions from taxation are not favored by law, and will not be sustained unless such clearly appears to have been the intent of the legislature. Public policy in the United States has almost necessarily exempted from the scope of the taxing power large amounts of property used for religious, educational and municipal purposes; but this list ought not to be extended except for very substantial reasons; and while, as we have held in many cases, legislatures may in the interest of the public, contract for the exemption of other property, such contracts should receive a strict interpretation, and every reasonable doubt be resolved in favor of the taxing power. Indeed, it is not too much to say that courts are astute to seize upon evidence tending to show either that such exemptions were not originally intended, or that they have become inoperative by changes in the original constitution of the companies."

Where, however, the consolidation act provides that the consolidated corporation shall be "vested with all the immunities" of the old companies, or uses other language

¹ *Norfolk, etc. R. Co. v. Pendleton*, 156 U. S. 673 (1895), (15 Sup. Ct. Rep. 413): "We have frequently held that, in the absence of express statutory direction, or of an equivalent implication by necessary construction, provisions, in restriction of the right of the State to tax the property or to regulate the affairs of its corporations, do not pass to new corporations succeeding, by con-

solidation or by purchase under foreclosure, to the property and ordinary franchises of the first grantee."

See also *Petersburgh v. Petersburg R. Co.*, 29 Gratt. (Va.) 773 (1878).

² *Yazoo, etc. R. Co. v. Adams*, 180 U. S. 22 (1901), (21 Sup. Ct. Rep. 240). See also *Railroad Co. v. Georgia*, 98 U. S. 363 (1878); *Railroad Co. v. Maine*, 96 U. S. 308 (1877).

clearly evidencing a legislative intent to bestow such special privileges upon the consolidated corporation, it thereby succeeds to an exemption from taxation contained in the charter of a constituent corporation.¹ Such an exemption, however, applies only to the property to which it adhered when enjoyed by the original company. "Whatever property was subject to taxation would, after the consolidation, remain so."²

Improvements, betterments and repairs made upon the properties by the consolidated company are subject to taxation or exemption according to the rule applied to the respective properties upon which they were made.³

¹ *Atlantic, etc. R. Co. v. Allen*, 15 Fl. 637 (1876). In this case the act provided that "all the rights, franchises and privileges" should pass, and the Court said: "A right of exemption from taxation can be passed under the general language 'all the rights' the same as any other right. We can see no difference. . . . The term 'all rights' embrace each right."

See, however, *post*, § 160: "*Exemptions from Taxation*."

² A railroad corporation, formed under an act of the legislature, by the consolidation of existing companies and "vested with all the rights, privileges, franchises, and property which may have been vested in either company prior to the act of consolidation," acquires no greater immunity from taxation than they severally enjoyed as to the portions of the road which belonged to them under their respective charters. Whatever property was subject to taxation would, after the consolidation, remain so. *Chesapeake, etc. R. Co. v. Virginia*, 94 U. S. 718 (1876).

See also *Central, etc. R. Co. v. Georgia*, 92 U. S. 665 (1875); *Branch v. Charleston*, 92 U. S. 677 (1875); *Tomlinson v. Branch*, 15 Wall. 460 (1872); *Charleston v. Branch*, 15 Wall. (U. S.) 470 (1872), *note*; *Delaware R. R. Tax.*, 18 Wall. 206 (1873); *Philadelphia, etc. R. Co. v. Maryland*, 10 How. 377 (1850); *State v. Woodruff*, 36 N. J. L. 94 (1872); *State v.*

Philadelphia, etc. R. Co., 45 Md. 361 (1876), (24 Am. Rep. 511).

³ *Branch v. Charleston*, 92 U. S. 682 (1875): "It does not follow, therefore, that this part of the road, though used for the accommodation of both branches, should be regarded as divisible into proportional parts, one subject to taxation and the other not. It is to be regarded as simply the road and property of the old company; in the hands of the new company it is true, but subject to all the liabilities of its original charter. Hence we held that the entire line of road between Branchville and Charleston is subject to taxation; and that *prima facie* the railroad terminus and depot in Charleston and the property accessory thereto belong to the older portion of the joint property. But inasmuch as the charter right of the present company extended to Charleston, we further held, that if it could be fairly shown that any of the company's property there was acquired by the present company for the accommodation of the business belonging to its original roads, or for the joint accommodation of the entire system of roads under its control, such property would, *pro tanto* and in fair proportion, be exempt from taxation. This was intended to meet the case of such property as the present company might have acquired in Charleston, either separately or in conjunction with the old company, had no consolidation

A conditional exemption from taxation dependent upon certain returns being made and certain acts performed, which the consolidated corporation is neither required nor able to make or perform, does not enure to its benefit.¹

§ 73. **Special Privileges and Immunities other than Tax Exemptions.** — Upon a consolidation of gas light companies the consolidated corporation may obtain the exclusive privilege of a constituent company to supply a city with gas.² A consolidated railroad corporation may acquire the limited liability of one of its constituents for damages for killing live stock.

A provision in the charter of a constituent corporation exempting its officers, agents and servants from military and road duty and from serving on juries, is not a mere personal privilege conferred upon the classes of persons described but constitutes a valuable right in the company, and passes, upon consolidation, to the consolidated company.⁴

II. Powers.

§ 74. **Powers of Consolidated Corporation. In General.** — When consolidation is effected through a process of merger

taken place, and had the line between Branchville and Charleston, used by both, remained the property of the old company. Of course, in carrying out this principle, any repairs or improvements made on the old line or the property of the old company would become a part thereof, and be subject to taxation."

¹ *State v. Maine Central R. Co.* 66, Me. 499 (1877): "The defendant's claim to immunity from taxation or for a limited and conditional taxation rests only on the word 'immunities' in section 4. But to entitle them to immunity they must first of all be enabled or required to make the several returns, and do and perform the several acts upon which such limited taxation is to be based. But that they are not so enabled or required, will be fully seen.

Nor is it pretended or alleged that such acts have been done." *Affirmed sub nom. Railroad Co. v. Maine*, 96 U. S. 508 (1877).

² *New Orleans Gas Co. v. Louisiana Light, etc. Co.*, 115 U. S. 650 (1885), (26 Sup. Ct. Rep. 52).

³ *Daniels v. St. Louis, etc. R. Co.*, 62 Mo. 43 (1876) (sale).

⁴ *Zimmer v. State*, 30 Ark. 677 (1875). See also *Hawkins v. Small*, 7 Baxt. (Tenn.) 193 (1874).

Where the employees of a Tennessee corporation were exempt from road work and the corporation was incorporated in Alabama with the same privileges it was held that the employees were likewise exempt from such duty in Alabama. *Johnson v. State* 88 Ala. 176 (1889), (7 So. Rep. 253).

the absorbing corporation continues in existence with its original powers and with such additional powers, derived from the corporations absorbed, as the consolidation statute may confer.

When, however, the original corporations are dissolved and a new and distinct corporation is created, the consolidation act is treated as a grant of a new charter to the consolidated corporation¹ which acquires and can exercise no powers not granted expressly or by necessary implication therein.² It will be implied that the consolidated company takes and may exercise the powers necessary for the use of the property and franchises, and for the transaction of the business acquired.

The consolidation statute need not specifically enumerate the corporate powers conferred, but may, and usually does, designate the powers and privileges granted by reference to the powers of the constituent companies. "Powers and privileges may as well be designated by reference to the charters of other companies as by special enumeration."³ The privileges so granted by reference, however, while similar to those of the former companies, are not the same. They are, essentially, privileges of the new corporation, to be exercised according to its constitution and for the purposes of its creation.⁴

¹ In *Shields v. Ohio*, 95 U. S. 323 (1877), Mr. Justice Swayne said: "When the consolidation was completed, the old corporations were destroyed, a new one was created, and its powers were 'granted' to it, in all respects, in view of the law, as if the old companies had never existed, and neither of them had ever enjoyed the franchises so conferred."

See also *Charlotte, etc. R. Co. v. Gibbes*, 27 S. C. 385 (1887), (4 S. E. Rep. 49).

² *Shields v. Ohio*, 95 U. S. 323 (1877); *Mead v. New York, etc. R. Co.*, 45 Conn. 199 (1877).

³ *State v. Keokuk, etc. R. Co.*, 99 Mo. 41 (1889), (12 S. W. Rep. 290).

Also *Shields v. Ohio*, 95 U. S. 323 (1877): "The language was brief and

was made operative by reference. But this did not affect the legal result. A deed *inter partes* may be made as effectual by referring to a description elsewhere as by reciting it in full in the present instrument."

⁴ Where a new corporation is formed out of two existing corporations, which, under the terms of the consolidation, cease to exist, the law creating the new corporation controls in determining what are its corporate powers and franchises. *Crawfordsville, etc. Turnpike Co. v. Fletcher*, 104 Ind. 97 (1883), (2 N. E. Rep. 243). For references to consolidation statutes providing generally that the consolidated company shall possess all the powers, rights, franchises, etc. of the consolidating corporations, see note to § 65, *ante*.

The amount of capital stock which the consolidated corporation is authorized to issue is generally fixed by the consolidation act with reference to the amounts issued by the companies consolidating; and, in some States, it is provided that the capital stock of the consolidated corporation shall not exceed the total amount of the capital of its constituents.¹

§ 75. **Power to issue Mortgage Bonds.**—General consolidation statutes often provide that the consolidated company may, under prescribed conditions, issue bonds and secure them by mortgage of its property and franchises,² and may exchange the bonds so issued for the bonds of its constituent companies.³

Under authority to issue mortgage bonds, it has been held that a consolidated corporation may do so for the purpose of taking up bonds previously issued by a constituent corporation.⁴ A consolidated company may also purchase and retire the bonds of its constituents.⁵

¹ *Connecticut*: Gen'l. Stat. 1888, § 3444.

Idaho: Session Laws 1901, p. 214, § 2.

New York: Railroad Law, § 71, Birdseye's R. S. 1901.

North Dakota: Rev. Code, 1899, § 2954.

Oklahoma: Stat. 1893, par. 1016, Art. 9, § 15.

Washington: Ballinger's Anno. Stat. 1897, § 4304.

In *New Hampshire* the capital stock of the consolidated company may not exceed the shares of the constituent corporations "actually issued and paid for at par." (Pub. Stat. 1901, ch. 156, § 26, p. 504.)

In *Pennsylvania* the amount of the capital stock is not limited to the amount of the issues of the consolidating companies and is fixed in the consolidation agreement. (Bright. Purd. Dig. 1894, § 112, p. 1802.) See also as to power to increase stock, *Alabama* Code, § 1150. *New Jersey* Railroad Law, par. 252-3 (G. S. 1895, p. 2698).

² *Colorado*: Mills' Anno. Stat. 1891, ch. 30, § 607.

Connecticut: Gen'l. Stat. 1888, § 3447.

Georgia: Code 1895, § 2179.

New Jersey: G. S. 1895, Vol. II. R. R. Law, §§ 253, 255.

New York: Railroad Law, § 72, Birdseye's R. S. 1901.

Ohio: Bates' Anno. Stat. 1902, § 3309 A.

Pennsylvania: Bright. Purd. Dig. 1894, §§ 110, 111, p. 1802.

Tennessee: Code 1896, § 1528, par. 5; Code 1884, § 1269.

³ *New Jersey*: G. S. 1895, Vol. II., p. 2698; R. R. Law, § 253.

New York: Railroad Law, § 72, Birdseye's R. S. 1901.

Pennsylvania: Bright. Purd. Dig. 1894, §§ 110, 111, p. 1802.

Consolidation statutes also sometimes limit the amount of bonds and their rate of interest and prescribe the method to be followed in issuing them.

⁴ *Camden Safe Deposit, etc. Co. v. Burlington Carpet Co.* (N. J. 1895), 33 Atl. Rep. 479.

⁵ *Shaw v. Norfolk County R. Co.*, 16 Gray (Mass.), 411 (1860): "Then [upon consolidation] the Boston and New York Railroad Company, having

Consolidation acts sometimes stipulate that no bonds or other evidences of indebtedness shall be issued as a consideration for or in connection with a consolidation.¹

§ 76. **Right of Eminent Domain.** — A consolidated corporation acquires, among its powers and privileges, the right to condemn property under the power of eminent domain granted to a constituent corporation.²

It has been questioned whether it takes this power as a *quasi*-successor of the constituent corporation to which it was originally granted or whether the transfer operates as a new grant of the power, upon the same terms, to the consolidated company. In *Abbott v. New York, etc. R. Co.*³ the Supreme Judicial Court of Massachusetts said: "It seems to us equally clear that a corporation, by consent of the legislature, may take this power as *quasi*-successor of another corporation to which it was originally granted, and it is not very material whether the legislature be regarded as authorizing a transfer of the old power, or, more strictly, as delegating a new power in the same terms as the old. The substance of the transaction is seen in cases of consolidation." Upon the principle, however, that a consolidated corporation takes everything by creation and grant it seems the better view that the consoli-

become the owners of the franchises and property of the Norfolk County Railroad Company, subject to the rights of their creditors, could either become purchasers of the outstanding bonds, and hold them like other creditors, or could pay and extinguish them for the relief and discharge of their own property, as they should deem it best for their interest and advantage to do."

¹ *Connecticut*: Gen'l Stat. 1888, § 3444.

Idaho: Session Laws 1901, p. 214, § 2.

New York: R. R. Law, § 71, Birdseye's R. S. 1901.

North Dakota: Revised Codes 1899, § 2954.

Oklahoma: Stat. 1893, par. 1016, p. 252.

Washington: Ballinger's Anno. Stat. 1897, § 4304.

² *Abbott v. New York, etc. R. Co.*, 145 Mass. 450 (1888), (15 N. E. Rep. 91). See also *South Carolina R. Co. v. Blake*, 9 Rich. (S. C.) 228 (1856); *Trester v. Missouri, etc. R. Co.*, 33 Neb. 171 (1891), (49 N. W. Rep. 1110); *Toledo, etc. R. Co. v. Dunlap*, 47 Mich. 456 (1882), (11 N. W. Rep. 271, 5 Am. & Eng. R. Cas. 378); *Boston, etc. R. Co. v. Midland R. Co.*, 1 Gray (Mass.) 359 (1854).

The right to condemn lands is sometimes expressly conferred upon the consolidated corporation in the consolidation act.

Michigan: P. A. 1901, p. 117.

New Jersey: R. R. Law, par. 341, § 2.

³ *Abbott v. New York, etc. R. Co.*, 145 Mass. 453 (1888), (15 N. E. Rep. 91).

dation statute operates as a new grant of this and other powers.

Inchoate rights of a constituent corporation, under pending condemnation proceedings, pass to the consolidated company upon consolidation.¹

§ 77. **Miscellaneous Powers.** — It has been held that a corporation which, by its charter, has power to “unite with any other company” by consolidating with another corporation exhausts the power, and it does not pass, with other powers and privileges, to the consolidated corporation.² The right of further consolidation is, however, sometimes expressly conferred in consolidation statutes.³

A consolidated corporation may apply the amount received from calls upon subscriptions to one constituent company in payment of the debts of another;⁴ may compromise and settle claims against any constituent company and maintain an action to enforce the settlement;⁵ may exercise the power of a constituent corporation to charge a fixed rate for transportation⁶ and, generally, may enjoy and exercise any rights and powers conferred by the consolidation act.⁷

¹ Proceedings instituted by a railroad company to acquire lands, by condemnation, for its road, in which commissioners have made their report and award of damages, from which the land owner has appealed, do not become void *ab initio* nor abate, by reason of the consolidation and merger of the condemning company with another railroad company, forming a new corporation; but the rights in the land acquired by the condemnation proceedings survive and pass to the new corporation, and it may be lawfully substituted as appellee in the appellate court and the case then proceed to trial. *Day v. New York, etc. R. Co.*, 58 N. J. L. 677 (1896), (34 Atl. Rep. 1081).

See also *California Central R. Co. v. Hooper*, 76 Cal. 404 (1888), (18 Pac. Rep. 599).

² *Morrill v. Smith County*, 89 Tex. 529 (1896), (36 S. W. Rep. 56). See however, *Zimmer v. State*, 30 Ark. 677 (1875).

³ *Idaho*: Laws 1901, p. 214.

North Dakota: Rev. Codes 1899, § 2954.

Washington: Ballinger's Anno. Code & Stat. § 4304.

Wisconsin: Stat. 1898, § 1833 (as amended by Laws 1899, ch. 191).

⁴ *Cooper v. Shropshire Union R., etc. Co.*, 13 Jur. 443 (1849), (6 Eng. Railw. Cases, 136).

⁵ *Paine v. Lake Erie, etc. R. Co.*, 31 Ind. 283 (1869).

⁶ *Fisher v. New York Central, etc. R. Co.*, 46 N. Y. 644 (1871).

⁷ Where a consolidation act provided that the new company should have the powers, rights and franchises conferred upon two or more railroad corporations in case they should bear such relation to each other as to admit the passage of cars over their roads continuously, it was held that such corporations having the power to acquire and hold land, might confer that power upon the con-

It has been held that a consolidated corporation has no power to declare dividends upon its stock out of the earnings, before consolidation, of a corporation absorbed by it, nor to declare dividends upon the stock of the merging corporation out of its own earnings.¹

CHAPTER VIII.

OBLIGATIONS OF CONSOLIDATED CORPORATION.

I. *Direct Obligations.*

- § 78. Constitutional Limitations.
- § 79. As a General Rule Consolidated Corporation directly assumes all Obligations of Constituents.
- § 80. Obligation to perform Public Duties of Constituents.
- § 81. Liability of Consolidated Company to Bondholders and Preferred Stockholders of Constituents. Other Special Contracts.
- § 82. Liability for Torts of Constituents.
- § 83. Rule of Liability inapplicable to Consolidation after Foreclosure Sale.

II. *Liens.*

- § 84. Conventional and Statutory Liens.
- § 85. Equitable Liens.

III. *Remedies of Creditors of Constituent Corporations.*

- § 86. Remedy of Creditors against Consolidated Corporation — At Law.
- § 87. Remedy of Creditors — In Equity.
- § 88. Remedy against Constituent Corporation if not dissolved.
- § 89. Effect of Consolidation upon Pending Suits.
- § 90. Procedure regarding Pending Suits.
- § 91. Allegation and Proof of Consolidation.

I. *Direct Obligations.*

§ 78. **Constitutional Limitations.** — Upon principles elsewhere considered, the obligations of a consolidated corpora-

solidated company if it came within the proviso stated. Georgia, etc. R. Co. v. R. Co., 67 N. Y. 371 (1876); Georgia Wilks, 86 Ala. 478 (1888), (6 So. Rep. 34). land see Matter of Prospect Park, etc. R. Co. v. Gaines, 88 Ala. 377 (1889), (7 So. Rep. 382).

Generally as to the right of consolidated corporations to acquire title to Miscellaneous statutory provisions relating to powers and privileges of con-

¹ Chase v. Vanderbilt, 37 N. Y. Super. Ct. 334 (1874).

tion, as a new and distinct corporation, are determined by the constitutional provisions and statutes in force at the time of its creation and not by those existing at the time of the creation of its constituent companies.¹ Thus the Supreme Court of the United States, in a leading case, held that a constitutional provision that "no special privileges shall ever be granted that may not be altered, revoked or repealed by the general assembly," entered into an act under which railroad companies had consolidated and rendered the consolidated corporation subject to the obligation — imposed by a later statute — of carrying passengers at a reduced rate of fare, which would not have been binding upon its constituent companies.²

§ 79. **As a General Rule Consolidated Corporation directly assumes all Obligations of Constituents.** — Consolidation statutes generally provide that all rights of creditors and all liens upon the property of constituent corporations shall continue unimpaired after consolidation, and that their debts, duties and liabilities shall attach to the consolidated company and be enforceable against it, to the same extent and by the same process as if they had been contracted by it.³

solidated corporations are as follows: Consolidated company may take, hold and dispose of stocks and bonds acquired by consolidation (*Ohio. Bates' Anno. Stat. 1902, § 3384 A*). Corporation formed by consolidation of domestic and foreign railroads may hold and own necessary real estate in adjoining State (*Missouri. R. S. 1899, § 1060*). Land grants pass to consolidated company (*Wisconsin. Stat. 1888, § 1833 as amended*). Consolidated company acquires no extraordinary powers not enjoyed by each of constituents (*South Carolina. R. S. 1893, § 1624*). Consolidated company cannot change location of road which has received municipal aid (*Illinois. R. S. 1901, § 39*). Consolidated company has no powers and privileges which could not be possessed by corporation originally organized under the act (*Michigan. P. A. 1899, p. 451, § 29*). Corporate existence of consoli-

dated company limited to ninety-nine years (*Louisiana. R. S. 1897, p. 758*). In addition to general powers, consolidated company enjoys rights, etc. of each of its constituents (*New York. Business Corp. Law (amended to 1900) § 10*).

¹ See *ante*, § 71: "*Constitutional Limitations upon Grants of Privileges and Immunities*."

² *Shields v. Ohio*, 95 U. S. 319 (1877). See also *Pick v. Northwestern R. Co.*, 6 Biss. (U. S.) 177 (1874).

Restrictions as to rate of fare in charters of original companies bind consolidated corporation. *Campbell v. Marietta, etc. R. Co.*, 23 Ohio St. 168 (1872).

³ The provision in the *New York* railroad consolidation act is as follows: Railroad Law § 73 (*Birdseye's R. S. 1896, p. 2554*): "The rights of all the creditors of, and all liens upon the

In the absence of special statutory provision, moreover, when a new corporation is formed by the consolidation, under authority of law, of several distinct corporations and acquires their rights and faculties it must, as a necessary consequence, be subject to all the conditions and duties imposed by the law of their creation,¹ and is answerable for the debts and liabilities of each of such corporations,² — at least to the extent of the property received from that particular corporation.³

property of, either of such corporations, parties to such agreement and act, shall be preserved unimpaired, and the respective corporations shall be deemed to continue in existence to preserve the same, and all debts and liabilities incurred by either of such corporations shall thenceforth attach to such new corporation, and be enforced against it and its property to the same extent as if incurred or contracted by it."

Other similar but less elaborate statutes, relating to railroad consolidations (except as noted) are as follows:

Alabama: Code 1896, § 1168; § 1151 (business corporations).

Arizona: R. S. 1901, par. 864, § 3.

Arkansas: S. & H. Dig. 1894, § 6188,

California: Pom. Civ. Code, 1901, § 473.

Colorado: Mills' Anno. Stat. 1891, § 607. § 628 (corporations generally).

Connecticut: G. S. 1888, § 3446; P. A. 1901, ch. 151, § 40 (business corporations).

Delaware: Laws 1901, § 60; Laws 1899 § 55 (business corporations).

Illinois: R. S. 1901, p. 1376, § 41.

Idaho: Laws 1901, p. 214; R. S. 1887 § 2673.

Kansas: G. S. 1897, ch. 70, § 92.

Kentucky: Stat. 1899, ch. 32, § 770; Stat. 1894, § 556 (business corporations).

Louisiana: Rev. Laws 1897 (Act 39, 1877, p. 50); Act of Dec. 12, 1874 (business corporations).

Maryland: § 39 a (Act of April 7,

1892) supplementing Gen. Laws 1888, ch. 23 (business corporations).

Michigan: Comp. Laws 1897, § 6255.

Minnesota: G. S. 1894, §§ 2715, 2720.

Missouri: R. S. 1889, § 2786 (manufacturing companies).

Montana: Code & Stat. § 527 (mining companies).

Nebraska: Comp. Stat. 1901, § 1767.

Nevada: G. S. 1885, § 875; § 1076 (corporations generally).

New Jersey: G. S. 1895, p. 2697, § 3, par. 251; p. 2703, par. 283; General Corporation Act 1896, §§ 106, 107, relates to business corporations.

New Mexico: Comp. Laws 1897, § 3896.

New York: Business Corp. Law (amended to 1901), § 12.

Ohio: Bates' Anno. Stat. 1902, § 3384.

Pennsylvania: Bright. Purd. Dig. 1894, p. 1804, § 117; p. 1801, § 109.

South Carolina: R. S. 1893, § 1618.

Tennessee: Code 1896, § 1526.

Utah: R. S. 1898, § 341 (corporations generally).

West Virginia: Code 1899, ch. 54, § 53 (as amended by Acts 1901, ch. 108).

Wyoming: R. S. 1899, § 3204.

¹ *Chicago, etc. R. Co. v. Moffitt*, 75 Ill. 524 (1874).

² *Langhorne v. Richmond, etc. R. Co.*, 91 Va. 374 (1895), (22 S. E. Rep. 159): "The corporation which is created by the consolidation of other corporations, or the surviving corpora-

³ *Brum v. Merchants Mut. Ins. Co.*, 16 Fed. 140 (1883); *Harrison v. Arkansas Valley R. Co.*, 4 McCrary (U. S.) 264 (1882); *Chicago, etc. R. Co. v. Galey*, 141 Ind. 360 (1895), (39 N. E. Rep. 925).

In *Indianapolis, etc. R. Co. v. Jones*,¹ the Supreme Court of Indiana said: "For the purpose of answering for the liabilities of the constituent corporations, the consolidated company should be deemed to be merely the same as each of its constituents; their existence continued in it, under the new form and name, their liabilities still existing as before and capable of enforcement against the new company in the same way as if no change had occurred in its organization or name."²

The statutory liability of a consolidated corporation for the debts and liabilities of its constituents cannot be impaired, as to outside creditors, by any stipulations in the consolidation agreement. Parties to the agreement, however, holding claims

tion when another or others are merged into it, is ordinarily deemed the same as each of the corporations which formed it for the purpose of answering for the liabilities of the old corporation, and may be sued under its new name, or under the name of the surviving company, for their debts, as if no change had been made in the name, or in the organization of the original corporations."

Louisville, etc. R. Co. v. Boney, 117 Ind. 501 (1888), (20 N. E. Rep. 432): "The act of consolidation involves an implied assumption by the new company of all the valid debts and liabilities of the consolidating companies."

Berry v. Kansas City, etc. R. Co., 52 Kan. 774 (1894), (36 Pac. Rep. 724, 39 Am. St. Rep. 381): "The debts of the original companies follow as an incident of the consolidation and become, by implication (in the absence of express provision), the obligations of the new corporation."

See also:

United States: Pullman Palace Car Co. v. Missouri Pac. R. Co., 115 U. S. 587 (1885), (6 Sup. Ct. Rep. 194); *Wabash, etc. R. Co. v. Ham*, 114 U. S. 587 (1885), (5 Sup. Ct. Rep. 1081).

Alabama: Warren v. Mobile, etc. R. Co., 49 Ala. 582, (1873).

Georgia: Montgomery, etc. R. Co. v. Boring, 51 Ga. 582 (1874).

Illinois: Columbus, etc. R. Co. v. Skidmore, 69 Ill. 566 (1873); *Chicago, etc. R. Co. v. Moffitt*, 75 Ill. 524 (1874); *Western, etc. R. Co. v. Smith*, 75 Ill. 496 (1874).

Indiana: Indianapolis, etc. R. Co. v. Jones, 29 Ind. 465 (1868); *Columbus, etc. R. Co. v. Powell*, 40 Ind. 37 (1872).

Missouri: Thompson v. Abbott, 61 Mo. 176 (1875).

¹ *Indianapolis, etc. R. Co. v. Jones*, 29 Ind. 467 (1868).

² In *Day v. Worcester, etc. R. Co.*, 151 Mass. 308 (1890), (23 N. E. Rep. 824), the Supreme Judicial Court of Massachusetts said: "When two corporations are consolidated, no doubt for most purposes they cease to exist, and the new corporation is a distinct person in the eye of the law, although it their legal successor. But no fiction is necessary so far as the legislature sees fit to say that the new corporation shall be regarded as the same with one of the old ones or even alternately as the same with each; or, more explicitly, that although the new corporation is a new person for the acquisition of new rights or the making of new contracts, the old corporations shall not be altogether ended, but shall continue under the new name so far as to preserve all their existing obligations unchanged."

against the consolidating corporations may bar themselves from proceeding against the consolidated corporation therefor.¹

§ 80. **Obligation to perform Public Duties of Constituents.**—The public duties of corporations, whether imposed by express statutory provisions or assumed as the consideration of the grant of franchises, devolve, upon consolidation, upon the consolidated company.² They become, essentially, the obligations of that company, and the necessity for their continued performance bears no relation to the chartered life of the corporation to which they were originally attached. Thus it was held that, upon the consolidation of gas light companies, the obligation imposed by the legislature on a consolidating company to furnish gas, free of charge, to a charity hospital, adhered to the consolidated company without reference to the duration of the charter of the original company.³

¹ *Matter of Utica National Brewing Co.*, 154 N. Y. 277 (1897), (48 N. E. Rep. 521): "In the consolidation of corporations, pursuant to the provisions of the statute, the new corporation starts upon its existence freighted with the liabilities of the old companies and subject to the terms and conditions of the consolidation agreement, so far as they are not in conflict with the law. While it is not competent to do anything which would impair the rights of outside creditors, there is no reason why the parties to the consolidation agreement may not bind themselves to something deemed for the benefit of the new corporation, and that is what seems to have been done in this case. The manifest intention of the stockholders of the old companies, who united in making and signing the consolidation agreement, seems to have been to represent that their corporate properties and franchises vested in the new company freed from any burden of indebtedness. As to creditors not assenting to any such arrangement, this was quite unavailing; but as to themselves it should, and would, operate to bar their claims, while the other creditors were seeking payment from the assets

of the corporation since become insolvent."

² *Tomlinson v. Branch*, 15 Wall. (U. S.) 465 (1872): "The keeping alive of the rights and privileges of the old company, and transferring them to the new company in connection with the property, indicates the legislative intent, that such property was to be holden in the same manner and subject to the same rights as before. The owners of the property were to lose no rights by the transfer, nor was the public to lose any rights thereby. Of course, these remarks do not apply to those corporate rights and franchises of the old company, which appertain to its existence and functions as a corporation. These became merged and extinct. But all its rights and duties, its privileges and obligations, as related to the public, or to third persons, remain, and devolve upon, the new company."

³ *Charity Hospital v. New Orleans Gas Light Co.*, 40 La. Ann. 388 (1888), (2 So. Rep. 433): "Through the same channel which led the defendant company to the right of ownership of all the property and rights of the former New Orleans Gas Light Company, it must

An attempt in a consolidation agreement between *quasi*-public corporations to prevent the devolution of public duties upon the consolidated company and any attempt by the consolidated company to absolve itself from its obligations to the public, are against public policy. In *Peoria, etc. R. Co. v. Coal Valley Mining Co.*, the Supreme Court of Illinois said:¹ "When they accept their charters, it is with the implied understanding that they will fairly perform these duties to the public, as common carriers of both persons and property, under the responsibility which that relation imposes. And this is a duty they cannot escape by neglect, refusal, or by agreement with other persons or corporations that they will disregard or refuse to perform them. These are duties they owe the public, and it was in consideration that they would be performed that their charters were granted. They have no power to absolve themselves from performing these charter obligations, and any effort to do so by contract or otherwise is void."

§ 81. **Liability of Consolidated Company to Bondholders and Preferred Stockholders of Constituents. Other Special Contracts.** — The rule that a consolidated corporation is liable upon the obligations of its constituents applies to their sealed

be led and coerced to the discharge of the obligations which have been imposed on its author by the law which had created it and which authorized the organization of the new company."

A corporation formed by the consolidation of two boom companies must maintain the separate booms of each company and deliver logs at each as required in the original charters. *Gould v. Langdon*, 43 Pa. St. 365, (1862).

Under the federal income tax law a consolidated corporation was held liable for a tax upon "interest certificates," in the nature of dividend scrip issued by a constituent company before consolidation where the consolidation act preserved all rights of creditors and made the new corporation liable for the debts and obligations of the old companies. *Bailey v. Railroad Co.*, 22 Wall (U. S.) 604 (1874).

As to liability of consolidated company in South Carolina to assessment for expenses of railroad commissioners see *Charlotte, etc. R. Co. v. Gibbes*, 27 S. C. 385 (1887), (4 S. E. Rep. 49).

¹ *Peoria, etc. R. Co. v. Coal Valley Min. Co.*, 68 Ill. 489 (1873). In this case a consolidation agreement between several railroad corporations contained a reservation to one of the companies of the exclusive right to carry coal over the united railroads until the annual interest payment due said company had been discharged from the tolls, and it was held that such agreement, in restraint of competition, was contrary to public policy and not enforceable in equity; that the consolidated company became liable for the performance of the duties of the original companies as common carriers and that no contract could absolve it therefrom.

instruments and special contracts as well as to their simple debts.¹

Bonds issued by a constituent corporation convertible into stock, at the option of the holder, confer upon him a valuable privilege, of which he cannot be deprived by consolidation. A holder of such convertible bonds is entitled to a fair opportunity to make his election, and cannot be relegated to the rights conferred by the consolidation agreement without it.² He may maintain an action against the consolidated company to recover damages for breach of the contract contained in the bond,³ or if consolidation has been effected on a basis of equality between the shares of the consolidated and the original company, he has the right to exchange his bonds for stock in the consolidated company.⁴ A stockholder, however, by participating, as such, in a consolidation which renders impossible the conversion of his bonds, may be held to have elected not to exchange.⁵

¹ Generally, that a consolidated company is liable upon the contracts of its constituents: *Western Union R. Co. v. Smith*, 75 Ill. 496 (1874); *Eaton, etc. R. Co. v. Hunt*, 20 Ind. 457 (1863); *Columbus, etc. R. Co. v. Skidmore*, 69 Ill. 566 (1873); *St. Louis, etc. R. Co. v. Miller*, 43 Ill. 199 (1867). Also cases in note to § 79, *ante*.

² *Rosenkrans v. Lafayette, etc. R. Co.*, 18 Fed. 513 (1883).

³ *John Hancock Mut. Life Ins. Co. v. Worcester, etc. R. Co.*, 149 Mass. 214 (1889), (21 N. E. Rep. 364).

⁴ A statute authorizing the consolidation of two railroad companies provided that the consolidated corporation should "be subject to all the duties, restrictions, obligations, debts, and liabilities to which, at the time of the union, either of said corporations is subject," and that "all claims and contracts . . . against either corporation may be enforced by suit or action . . . against the" consolidated corporation. The consolidation was made on the basis of equality between the shares of the two corporations. *Held*, that the holders of bonds of a constituent com-

pany convertible into stock were entitled to demand stock in the new corporation, as, for the purposes of the contract, the old corporation continued under the new name. *Day v. Worcester, etc. R. Co.*, 151 Mass. 302 (1890), (23 N. E. Rep. 824); *India Mut. Ins. Co. v. Worcester, etc. R. Co.* (Mass. 1890), 25 N. E. Rep. 975. See also *John Hancock Mut. Life Ins. Co. v. Worcester, etc. R. Co.*, 149 Mass. 214 (1889), (21 N. E. Rep. 364).

As to the right of holders of street railway bonds to convert them into stock of consolidated company under Massachusetts statute of 1879, ch. 151, see *Parkinson v. West End St. R. Co.*, 173 Mass. 446 (55 N. E. Rep. 891).

⁵ A person owning both stock and convertible bonds in a corporation did not exercise his option to have his bonds converted into stock when it was practicable, and acquiesced and participated in a consolidation by which it became impossible to secure the conversion, and it was held that he was bound by an election not to make the conversion. *Tagart v. Northern Cent. R. Co.*, 29 Md. 557 (1868).

A statute authorizing the consolidation of railroad companies and providing that all the liabilities of the constituent companies "except mortgages" should attach to the consolidated company, does not prevent an action by a mortgage bondholder against the consolidated company. The statute confines the *lien* to the mortgaged property, but does not debar the bondholder from enforcing his demand directly against the consolidated company without availing himself of the mortgage security.¹

A consolidated corporation is the representative of all its constituents and is liable to the stockholders of any one of them, upon a contract of such corporation relating to the payment of dividends upon its preferred stock.²

Contracts of carriage embraced in mileage or trip tickets, issued by a constituent corporation, must be carried out by the consolidated company as if made by itself.³ Covenants running with the land acquired from its constituents bind a consolidated company.⁴

The liability of a consolidated company upon the contracts of its constituents is precisely the same as that of the original company. Consolidation does not extend it. Thus the operation of a contract to haul cars on all lines owned or controlled by a railroad company is not extended, upon its consolidation, so as to include other roads which the consolidated company afterwards acquires.⁵

¹ *Polhemus v. Fitchburg R. Co.*, 123 N. Y. 502 (1890), (26 N. E. Rep. 31), *affirming* 50 Hun (N. Y.), 397 (1888). The statute referred to was New York Laws 1869 ch. 917, § 5.

² *Boardman v. Lake Shore, etc R. Co.*, 84 N. Y. 157 (1881). See also *Chase v. Vanderbilt*, 62 N. Y. 307 (1875). Compare *Prouty v. Lake Shore R. Co.*, 52 N. Y. 363 (1873).

³ *Tompkins v. Augusta Southern R. Co.*, 102 Ga. 436 (1897), (30 S. E. Rep. 992).

⁴ *Mobile, etc. R. Co. v. Gilmer*, 85 Ala. 422 (1888), (5 So. Rep. 138).

A constituent company had agreed, in consideration of the grant of a

right of way through certain lands, to build its roadbed so as to protect the land from overflow, and it was held that the consolidated company was liable for damages caused by a breach of the agreement. *Sappington v. Little Rock, etc. R. Co.*, 37 Ark. 23 (1881).

⁵ *Pullman Palace Car Co. v. Missouri Pacific R. Co.*, 115 U. S. 595 (1885), (6 Sup. Ct. Rep. 194): "The new company assumed, on the consolidation, all the obligations of the old Missouri Pacific. This requires it to haul the Pullman cars, under the contract, on all roads owned or controlled by the old company at the time of the consolidation, but it does not extend the opera-

§ 82. **Liability for Torts of Constituents.** — The usual consolidation statute declares that the consolidated corporation shall be answerable for the obligations of its constituent companies and thereby includes obligations arising *ex delicto* as well as *ex contractu*. And, without such statutory provision, the rule is that, unless expressly exempted, the consolidated corporation is directly liable for the torts of its constituents.

The liability is broad and includes both wrongful acts and negligence.¹

tion of the contract to other roads which the new company may afterwards acquire. The power of the old company to get the control of other roads ceased when its corporate existence came to an end, and the new company into which its capital stock was merged by the consolidation undertook only to assume its obligations as they then stood. It did not bind itself to run the cars of the Pullman Company on all the roads it might from time to time itself control, but only on such as were controlled by the old Missouri Pacific. Contracts thereafter made to get the control of other roads would be the contracts of the new consolidated company, and not of those on the dissolution of which that company came into existence. It follows that the present Missouri Pacific Company is not required, by the contract of the old company, to haul the Pullman cars on the road of the St. Louis, Iron Mountain and Southern Company even if it does now control that road, within the meaning of the contract."

In *San Francisco v. Spring Valley Water Works*, 48 Cal. 493 (1874), a corporation furnished water to a city under a contract providing that, if more favorable terms were granted to any other corporation, they should be granted to it. This company was absorbed by another corporation, to which more favorable terms had been granted. It was held that the latter corporation was not bound to furnish water under the contract of the former, but was

entitled to the more favorable terms given it before the absorption.

That the consolidated corporation takes the property and assumes the liabilities of its constituents in the exact condition in which they exist at the time of the consolidation, see *Franklin Life Ins. Co. v. Adams*, 90 Ill. App. 658 (1900).

¹ In *Coggin v. Central R. Co.*, 62 Ga. 685 (1879), (35 Am. Rep. 132), the Supreme Court of Georgia said: "By consolidating with or absorbing the Macon & Western Railroad Company under the consolidation act the Central Railroad Company became liable to answer for a breach of duty by the former company towards a person who was rightfully upon one of its trains, and who, while being carried thereon, sustained a personal injury by reason of such breach."

In *State v. Baltimore, etc. R. Co.*, 77 Md. 492 (1893), (26 Atl. Rep. 865), the Court said: "The new corporation thus created was in reality the embodiment under another name of the two formerly existing," and *held* that the combining companies could not by any contract between themselves conclude the rights of third persons who had been injured by their torts.

A consolidated corporation is liable in damages to a riparian owner whose land is overflowed and injured in consequence of an obstruction of the stream caused by the wrongful manner in which a bridge was constructed by a constituent company. *Chicago, etc.*

§ 83. **Rule of Liability inapplicable to Consolidation after Foreclosure Sale.** — The rule that a consolidated corporation is liable for the debts of its constituents is inapplicable, with reference to the debts of the defunct company, in the case of a consolidation effected after the purchase of corporate property and franchises at a foreclosure sale.¹ The foreclosure sale has the effect of extinguishing the claims of general creditors. The new company takes the property subject only to the liens against it. A statute providing that a consolidated company

R. Co. v. Moffitt, 75 Ill. 524 (1874); *Penley v. Railroad Co.*, 92 Me. 59 (1898), (42 Atl. Rep. 233).

After having commenced the construction of an improvement on plaintiff's land, a corporation consolidated with another, which completed the improvement, all title thereto being transferred to the new company. It was held that the consolidated company and not the original company was liable for damages caused by the completion of the improvement by the consolidated company, although the original company still retained a corporate existence. *Day v. New Orleans, etc. R. Co.*, 37 La. Ann. 131 (1885).

See also:

Alabama: *Warren v. Mobile, etc. R. Co.*, 49 Ala. 582 (1873).

Arkansas: *St. Louis, etc. R. Co. v. Marker*, 41 Ark. 542 (1883).

Georgia: *Tompkins v. Augusta Southern R. Co.*, 102 Ga. 436 (1897), (30 S. E. Rep. 992).

Indiana: *Indianapolis, etc. R. Co. v. Jones*, 29 Ind. 465 (1868); *Cleveland, etc. R. Co. v. Prewitt*, 134 Ind. 557 (1893), (33 N. E. Rep. 367); *Jeffersonville, etc. R. Co. v. Hendricks*, 41 Ind. 48 (1872); *Louisville, etc. R. Co. v. Summers*, 131 Ind. 241 (1892), (30 N. E. Rep. 873).

Kansas: *Berry v. Kansas City, etc. R. Co.*, 52 Kan. 759 (1898), (34 Pac. Rep. 805, 39 Am. St. Rep. 371).

Virginia: *Langhorne v. Richmond R. Co.*, 91 Va. 369 (1895), (22 S. E. Rep. 159).

¹ *United States*: *Hoard v. Chesa-*

peake, etc. R. Co., 123 U. S. 222 (1887), (8 Sup. Ct. Rep. 74); *Chesapeake, etc. R. Co. v. Miller*, 114 U. S. 184 (1885), (5 Sup. Ct. Rep. 813); *Hopkins v. St. Paul, etc. R. Co.*, 2 Dill. (U. S.) 396 (1872).

Arkansas: *Sappington v. Little Rock, etc. Co.*, 37 Ark. 23 (1881).

Illinois: *People v. Louisville, etc. R. Co.*, 120 Ill. 48 (1889), (10 N. E. Rep. 657); *Brufett v. Great Western R. Co.*, 25 Ill. 310 (1861).

Michigan: *Cook v. Detroit, etc. R. Co.*, 43 Mich. 349 (1880), (5 N. W. Rep. 390).

Pennsylvania: *Pennsylvania Transp. Co.'s Appeal*, 101 Pa. St. 576 (1882); *Stewart's Appeal*, 72 Pa. St. 291 (1872).

Texas: *Gulf, etc. R. Co. v. Newell*, 73 Tex. 334 (1887), (11 S. W. Rep. 342, 15 Am. St. Rep. 788). In construing the provisions of the *Texas* statute relating to the sale of railroads and franchises in foreclosure proceedings the Supreme Court of Texas, in *Houston, etc. R. Co. v. Shirley*, 54 Tex. 139 (1880), said: "The plain intent of the statute is to transfer the roadbed, track, franchise and chartered rights entire to the purchaser and associates, upon their adopting the form of organization prescribed in the charter and complying with its other requirements; and to remit creditors unsecured by lien, to their remedy against such assets as pass to the trustees of the sold out company."

Wisconsin: *Mepasha v. Milwaukee, etc. R. Co.*, 52 Wis. 414 (1881), (9 N. W. Rep. 396).

shall be liable for the debts of each corporation entering the consolidation is not to be so construed as to revive the debts of a constituent company which have been shut off by foreclosure, and such an act would probably be unconstitutional, if retroactive in terms.¹

II. *Liens.*

§ 84. **Conventional and Statutory Liens.** — The consolidation of corporations does not affect, or, in any way, impair liens upon their property.² The consolidated corporation takes the property of its constituents burdened with all existing charges. Mortgages,³ maritime liens,⁴ and other liens — conventional and statutory — remain unaffected by consolidation proceedings, and the rights of lien holders are neither increased nor diminished.

A consolidated corporation takes as a purchaser with notice, and cannot aver ignorance of a mortgage executed by one of its constituents, although unrecorded.⁵

¹ *Hatcher v. Toledo, etc. R. Co.*, 62 Ill. 477 (1872).

² *Hamlin v. Jerrard*, 72 Me. 80 (1881): "The consolidated company assumed the debts of its several parts and recognized the prior liens upon them. . . . There can be no loss of identity of the original companies in the consolidation, to the prejudice of the rights of prior creditors or to destruction of prior liens." See also *Eaton, etc. R. Co. v. Hunt*, 20 Ind. 457 (1863).

³ A railway company which had mortgaged its road, consolidated with two other companies forming a new corporation. The consolidation act provided that the first corporation should not be relieved from any liability; that the several corporations should become one; and that all the liabilities of the several corporations should appertain to the united corporations. *Held*, that mortgage bonds of the first corporation, bought by the new corporation and afterwards issued for its benefit for value, had not been extinguished, but

were a claim against the property covered by the mortgage. *Shaw v. Norfolk County R. Co.*, 16 Gray (Mass.) 407 (1860). As to rights of holders of income bonds see *Rutter v. Union Pacific R. Co.*, 17 Fed. 480 (1883).

⁴ Where two corporations united their vessels and other property used in navigation, and formed a new corporation, and in the contract of consolidation made arrangements for the payment of the debts of one or both before any dividends should be declared on the new stock, it was held that the new corporation could not avail itself of the doctrine applicable to a purchaser without notice, and that a lien, three years and a half old, would be enforced against one of the vessels so transferred to the new corporation. *The Key City*, 14 Wall. (U. S.) 654 (1871). Compare *The Admiral*, 18 Law Rep. 91.

⁵ Where by the consolidation of two railroad companies, another is created which, by the terms of the consolidation,

Upon the principle that no change in the identity of corporations through consolidation can prejudice the rights of lien holders, it is held that repairs and improvements, made by a consolidated company upon property—real or personal—mortgaged by a constituent before consolidation, are subject to the mortgage.¹ The necessity for this rule in the case of mortgaged chattels, *e. g.* railway rolling stock, is apparent.

§ 85. **Equitable Liens.** — A consolidated corporation takes the property of its constituents subject to equitable, as well as other, liens.

A vendor's lien upon real estate, for the unpaid purchase money, is not affected by the consolidation of the purchasing corporation with another.² An obligation to convey lands comes within the terms of a consolidation agreement transferring property subject to "all liens, charges and equities" and is binding upon the consolidated company. Such an obligation might have been equally binding, without such a provision, upon the principle that the property was charged with a trust to fulfil it and came into the hands of the consolidated company with notice.³

acquires all of the property and franchises and assumes all the debts and liabilities of the two of which it is formed, and which become extinct by its creation, it takes such property subject to the debts of the original companies, and burdened with all liens upon it which were valid against those companies, and will not be permitted to aver ignorance of an unrecorded mortgage previously executed by one of the original companies. *Mississippi Valley Co. v. Chicago, etc. R. Co.*, 58 Miss. 846 (1881).

See also *North Carolina R. Co. v. Drew*, 3 Woods (U. S.), 691 (1874).

¹ *Hamlin v. Jerrard*, 72 Me. 80 (1881).

Improvements of a permanent nature and repairs made by a consolidated corporation upon property acquired from a constituent corporation and subject to a mortgage executed by that company are covered by the mortgage and the mortgagee may be entitled to specific

performance of a covenant for further assurance therein. *Williamson v. New Jersey Southern R. Co.*, 25 N. J. Eq. 13 (1874).

² *North Carolina R. Co. v. Drew*, 3 Woods (U. S.) 691 (1879). In this case, where a railroad subject to a vendor's lien was acquired by a consolidating company, the Court said: "This consolidation, by which the two companies joined their properties together, did not discharge the lien. The property of the Tallahassee Company was brought into the common concern with all pre-existing equities attaching thereto. The consolidated company having, as one of its component parties the Tallahassee company which held subject to the lien, cannot be regarded as a *bona fide* purchaser without notice." See also *Branch v. Atlantic, etc. R. Co.*, 3 Woods (U. S.) 481 (1879).

³ *Union Pacific R. Co. v. McAlpine*, 129 U. S. 314 (1889), (9 Sup. Ct. Rep. 286): "The obligation of the Kansas

While creditors of consolidating corporations may follow the assets of their debtors into the hands of the consolidated corporation they have, in the absence of express provision, no lien thereon as against subsequent mortgagees or purchasers. Such a lien may, however, be created, and whether it exists, in a particular case, will depend upon the terms of the agreement of consolidation and of the statute under which consolidation takes place.¹ Where several railroad companies were consolidated and the consolidated company agreed to "*protect*" certain unsecured equipment bonds of a constituent company, it was held by Judge Gresham, in the Circuit Court of the United States,² that the holders of the equipment bonds acquired an equitable lien upon the property acquired by the consolidated company from such constituent which took precedence of a mortgage thereof, executed by the consolidated company. This decision was, however, reversed by the Supreme Court of the United States,³ which held that the

Pacific Railway Company to execute the contract by a conveyance of the 25½ acre tract to the McAlpines passed with the property of the defendant, the Union Pacific Railway Company, upon the consolidation of the two companies under the latter name. Whenever property charged with a trust is conveyed to a third party with notice, he will hold it subject to that trust, which he may be compelled to perform equally with the former owner. The vendee in that case stands in the place of such owner. Without reference, therefore, to the articles of union and consolidation, the Union Pacific Railway Company would, on general principles, be held to complete the contract made with the Kansas Pacific Company; and the articles in specific terms recognize this obligation."

See also *Vilas v. Page*, 106 N. Y. 439 (1887), (13 N. E. Rep. 743).

¹ *Wabash, etc. R. Co. v. Ham*, 114 U. S. 595 (1885), (5 Sup. Ct. Rep. 1081): "But upon the consolidation, under express authority of statute, of two or more solvent corporations, the business

of the old corporations is not wound up, nor their property sequestered or disturbed, but the very object of the consolidation, and of the statutes which permit it, is to continue the business of the old corporations. Whether the old corporations are dissolved into the new company, or are continued in existence under a new name and with new powers, and whether, in either case, the consolidated company takes the property of each of the old corporations charged with a lien for the payment of the debts of that corporation, depend upon the terms of the agreement of consolidation, and of the statute under whose authority that consolidation is effected."

² *Tysen v. Wabash, etc. R. Co.*, 15 Fed. 763 (1883), 11 Biss. (U. S.) 510.

³ *Wabash, etc. R. Co. v. Ham*, 114 U. S. 596 (1885), (5 Sup. Ct. Rep. 1081): "It was next contended that the stipulation in the agreement of consolidation that the bonds and debts therein specified of the former companies should 'be protected by the said consolidated company' created a lien in their favor. But it is only 'as to the principal

agreement to "protect" was merely a promise to pay the bonds as they matured, and that the equipment bondholders had no lien, equitable or otherwise, upon the property of the consolidated company. In a later decision, in a case brought by another holder of these equipment bonds against the same consolidated company, the Supreme Court of Ohio¹ declined to follow the Supreme Court of the United States but agreed with Judge Gresham, and held that the agreement to "protect" created an equitable lien, upon the principle that "where property is transferred upon condition that the grantee should pay some third person a debt, or sum of money, the latter acquires an equitable lien upon the property to the extent of the debt or sum which is to be paid to him."

III. *Remedies of Creditors of Constituent Corporations.*

§ 86. **Remedy of Creditors against Consolidated Corporation** — **At law.** — A question has been raised whether a consolidated corporation can be sued in an action at law upon liabilities of its constituent companies or whether resort must be had to equity. It is, however, now well settled that consolidation confers all the rights, property and franchises of the old companies upon the consolidated company and subjects it to all their liabilities, and that an action at law may be brought against it and a personal judgment obtained for the debts and torts of its constituent companies.² The right to bring such

and interest as they shall respectively fall due,' and 'according to the true meaning and effect' of the instruments or bonds which are the evidence of the debts, that it is stipulated that the debts shall 'be protected by the said consolidated company;' and the stipulation covers debts secured by mortgage as well as unsecured debts. The agreement 'to protect' referring to the time of payment, and 'the true meaning and effect' of the equipment bonds having been to create only a personal and unsecured debt of one of the former companies, the words 'shall be protected' must have the same meaning which

they ordinarily have in promises of men of business, 'to protect' drafts or other debts, not made or contracted by themselves, that is to say, a personal obligation to see that they are paid at maturity."

¹ *Compton v. Wabash, etc. R. Co.*, 45 Ohio St. 592 (1887), (16 N. E. Rep. 110).

² *Langhorne v. Richmond R. Co.*, 91 Va. 369 (1895), (22 S. E. Rep. 159), where the Court also said: "The question is not whether the consolidation compels a creditor to accept the defendant corporation as a new debtor against his will, or a person who has been

action is placed upon the ground that, for the purpose of answering to their liabilities, the existence of the old companies is continued in the consolidated company;¹ and it is also held that the statute fixing the liability and the proceedings thereunder, create the privity between the new company and the creditors of the old, necessary to support the action.²

injured to resort to a stranger for satisfaction, but whether it empowers the creditor of the person injured to resort, if he desires to do so, in the first instance, to the corporation which by the terms of the consolidation is made liable to him. The privity, some cases say, necessary to support this action is created by the statute authorizing the consolidation and the purchase and conveyance under it. Other authorities place the right to bring such an action on the ground that the effect of the consolidation is, as to the liabilities of the old company, not to dissolve the corporation which is the immediate debtor, but to continue its existence in the consolidated corporation. . . . Since by authority of law and the act of the parties the consolidated corporations are moulded into one with none of their rights impaired, and none of their responsibilities lessened, there is no good reason why the same proceedings may not be had against the new corporation as might have been had against the old to compel payment of liabilities. It avoids circuitry of action. It allows the party with whom the contract was made or to whom the injury was done to proceed directly against the corporation, which, by virtue of the consolidation proceedings, is made liable to it."

See also:

Alabama: Warren v. Mobile, etc. R. Co., 49 Ala. 582 (1873).

Georgia: Coggin v. Central R. Co., 62 Ga. 685 (1879).

Illinois: Arbuckle v. Illinois Midland R. Co., 81 Ill. 429 (1876); Columbus, etc. R. Co. v. Skidmore, 69 Ill. 566 (1873); St. Louis, etc. R. Co. v. Miller, 43 Ill. 199 (1867).

Indiana: Louisville, etc. R. Co. v.

Boney, 117 Ind. 501 (1888), (20 N. E. Rep. 432); Indianapolis, etc. R. Co. v. Jones, 29 Ind. 465 (1868).

Kansas: Berry v. Kansas City, etc. R. Co., 52 Kan. 774 (1893), (36 Pac. Rep. 724, 39 Am. St. Rep. 371).

Maryland: State v. Baltimore, etc. R. Co., 77 Md. 489 (1893), (26 Atl. Rep. 865).

Texas: Indianola R. Co. v. Fryer, 56 Tex. 609 (1882); Houston, etc. R. Co. v. Shirley, 54 Tex. 125 (1880); Missouri Pac. R. Co. v. Owens, 1 Tex. Civ. Cas. par. 384 (1883).

Compare, however, Whipple v. Union Pacific Co., 28 Kan. 474 (1882), where it was held that a consolidated corporation "is not liable for the debt of either constituent company unless it has in terms contracted to become so."

¹ Indianapolis, etc. R. Co. v. Jones, 21 Ind. 465 (1868); Langhorne v. Richmond R. Co., 91 Va. 369 (1895), (22 S. E. Rep. 159); Houston, etc. R. Co. v. Shirley, 54 Tex. 125 (1880). See also cases cited in preceding note.

² New Bedford R. Co. v. Old Colony R. Co., 120 Mass. 400 (1876) (sale): "In the absence of express provision, it cannot be inferred that it was the intention of the act to impair claims of third parties for existing liabilities, or to shorten the time within which the remedy must be pursued. The question is not whether the statute compels the creditor to accept the defendant corporation as a new debtor against his will, or an injured person to resort to a stranger for satisfaction, but whether it empowers the creditors or an injured person to resort, if he chooses, in the first instance, to the corporation which, by the terms of the statute, is made liable to him. And we are of opinion that it does, and

The consolidated company is bound by the admissions of a constituent corporation regarding its obligations, made before consolidation, and evidence of the same is admissible in an action brought thereon against the new company.¹

§ 87. **Remedy of Creditors — In Equity.** — A corporation holds its property as a trustee, first, to meet its obligations, and, afterwards, for the benefit of its stockholders. It cannot give away its property or enter a consolidation, the effect of which is to transfer its assets and terminate its existence, to the prejudice of its creditors.² A consolidated corporation is not a purchaser for value without notice, and a court of equity will treat the assets of a consolidating corporation as a trust fund for the benefit of its creditors and, upon its consolidation with unpaid debts, will pursue its assets and lay hold of them in the hands of the consolidated corporation and apply them for the payment of such debts.³

that the privity necessary to support this action is created by the statute and the purchase and conveyance under it."

¹ *Philadelphia, etc. R. Co. v. Howard*, 13 How. (U. S.) 333 (1851): "It is further objected that the admission was not made by the defendants in this action but by the Wilmington and Susquehannah corporation. It is true the action in the trial of which the admission was made, being brought before the union of the corporations, was necessarily in the name of the original corporation; but as, by virtue of the act of union, the Wilmington and Susquehannah Company, the Baltimore and Port Deposit Company, and the Philadelphia, Wilmington and Baltimore Company were merged in and constituted one body, under the name of the Philadelphia, Wilmington and Baltimore Railroad Company, it is very clear that at the time the trial took place in Cecil County Court, all acts and admissions of the defendant in that case, though necessarily in the name of the Wilmington and Susquehannah Company, were done and made by the same corporation which now defends this action."

² *Montgomery, etc. R. Co. v. Branch*, 59 Ala. 153 (1877): "A private corporation chartered to transact business is a trustee of its capital, property and effects — first for the payment of its creditors and afterwards for the benefit of its stockholders. . . . If leaving its debts unpaid, its capital, property and effects are distributed among its stockholders, or transferred for their benefit to third persons who are not *bona fide* purchasers, without notice, — and still more if the corporation be dissolved or become so disorganized that it cannot be made answerable at law, then a court of equity will pursue and lay hold of such property and effects, and apply them for the payment of what it owes to its creditors."

³ In *Harrison v. Arkansas Valley R. Co.*, 4 McCrary (U. S.) 264 (1882), it was held that where several corporations are united in one, and the property of the old companies is vested in the new, the latter is liable in equity for the debts of the former, at least to the extent of the property received from them, and that if it is also liable at law, the latter remedy is not exclusive. The Court said (p. 267): "If a creditor of the original corporation

While a creditor has an action at law against the consolidated corporation upon the obligations of constituent companies, such remedy, as already noted, is not exclusive, and he may, when he deems it to his advantage, resort to equity, and subject the property acquired from his debtor to the payment of the debt. Where, however, the consolidated corporation has sold the property so acquired to a *bona fide* purchaser, for value, a creditor cannot follow it.¹

§ 88. **Remedy against Constituent Corporation if not dissolved.** — Consolidation statutes sometimes provide that the consolidating corporations shall not be dissolved but that their existence shall be continued for the purpose of winding up their affairs.² The purpose of these statutes is to preserve the rights of creditors, unchanged and unimpaired. Under such a statute³ it is open to a creditor to enforce his demand either against the corporation whose debt it was or against the new corporation whose debt it becomes by virtue of the consolidation.⁴ His remedies are concurrent and the recovery

sees fit to proceed in equity to subject the property of that corporation in the hands of the consolidated company, he has a clear right to do so. . . . We are of the opinion that, under such circumstances, the consolidated corporation is liable in equity for the debts of the original corporation, at least to the extent of the value of the property received from it."

See also *Curran v. Arkansas*, 15 How. (U. S.) 304 (1853); *Montgomery, etc. R. Co. v. Branch*, 59 Ala. 139 (1877).

Compare, however, *Arbuckle v. Illinois Midland R. Co.*, 81 Ill. 429 (1876), where it was held that when a consolidated company becomes, by virtue of the consolidation, liable for the debts of the companies composing it, the creditor's remedy is complete and adequate at law, and that a court of equity will not assume jurisdiction to enforce it.

In *United New Jersey R., etc. Co. v. Haprock*, 28 N. J. Eq. 261 (1877), it was held that corporations which have become consolidated into a new corporation assuming all their liabilities, are

suable at law through the consolidated corporation; and that the fact that service of process cannot be had on them will not justify the resort to equity to enforce a strictly legal demand.

¹ *McMahon v. Morrison*, 16 Ind. 172 (1861).

² In *Whipple v. Union Pacific R. Co.*, 28 Kan. 474 (1882), where a consolidation statute provided that the consolidated corporation should not be liable for the debts of the consolidating corporations, which should continue in existence for the purpose of adjusting all demands against them, but that the consolidation should not prevent the enforcement of valid obligations against the property of each constituent in the hands of the consolidated company, it was held that a creditor of a constituent corporation could not maintain an action against the consolidated corporation until he had sued the constituent corporation and recovered judgment.

³ *New York: Laws*, 1892, ch. 691, § 12.

⁴ *Matter of Utica Nat. Brewing Co.*,

of a judgment against the old company does not affect his rights against the consolidated company. It merely changes the form of liability.

When consolidating corporations are continued in existence a creditor may institute insolvency proceedings against such a corporation, if such a remedy is available against corporations generally.¹

§ 89. **Effect of Consolidation upon pending Suits.** — While the effect of consolidation may be the dissolution of the constituent corporations and the creation of a new company in their stead, it does not destroy them in such a sense as to abate actions brought by or against them and pending at the time of the consolidation, and compel the plaintiff to begin anew.² In *Shackleford v. Mississippi Central R. Co.*³ the Supreme Court of Mississippi said: "The new company is the old company; it is each of the old companies. It is simply

154 N. Y. 268 (1897), (48 N. E. Rep. 521). See also *Gale v. Troy, etc. R. Co.*, 51 Hun (N. Y.), 470 (1889), (4 N. Y. Supp. 295).

¹ *Platt v. New York, etc. R. Co.*, 26 Conn. 514 (1857). Whether State insolvency courts would have jurisdiction over interstate consolidated corporation, *quære. Ib.*

As to construction of Ohio statute (R. S. § 3384), providing that consolidating corporations shall be deemed to continue in existence for the preservation of the rights of creditors, see *Bull v. Baltimore, etc. R. Co.*, 39 App. Div. (N. Y.) 236 (1899), (57 N. Y. Supp. 111.)

² *United States: Edison El. Light Co. v. U. S. El. Lighting Co.*, 52 Fed. 300 (1892); *Edison El. Light Co. v. Westinghouse*, 34 Fed. 232 (1888).

Illinois: Chicago, etc. R. Co. v. Ashling, 160 Ill. 373 (1896), (43 N. E. Rep. 373).

Indiana: Hanna v. Cincinnati, etc. R. Co., 20 Ind. 30 (1863).

Michigan: Swartwout v. Mich. Air Line R. Co., 24 Mich. 389 (1872).

Mississippi: Shackleford v. Miss. Cent. R. Co., 52 Miss. 159 (1876).

Missouri: In Evans v. Interstate Rapid Transit Co., 106 Mo. 601 (1891), (17 S. W. Rep. 489), the Court said: "Ordinarily the effect of a consolidation of two or more corporations into one is a dissolution of all of them and the creation of a new company. But legal proceedings properly commenced against a corporation are not effected by the expiration of the charter before the determination of such proceeding. So where one corporation is consolidated with another while a suit is pending against it, the suit does not abate."

Kinion v. Kansas City, etc. R. Co., 39 Mo. App. 382 (1889).

Tennessee: Railroad Co. v. Evans, 6 Heisk. 607 (1871).

Compare Prouty v. Lake Shore, etc. R. Co., 52 N. Y. 366 (1873).

That consolidation does not abate condemnation proceedings, see *California Cent. R. Co. v. Hooper*, 76 Cal. 404 (1888), (18 Pac. Rep. 599); *Day v. New York, etc. R. Co.*, 58 N. J. L. 677 (1896), (34 Atl. Rep. 1081.)

³ *Shackleford v. Miss. Cent. R. Co.*, 52 Miss. 159 (1876).

the onward flow of a stream which is formed by the uniting of two precedent streams."

As affecting the rights of creditors of the constituent corporations, the consolidated corporation should be regarded as continuing the existence of the old companies under a new name.¹ Consolidation statutes generally provide that consolidation shall not affect pending suits;² but, without such provision, a voluntary consolidation would not be considered as equivalent to the death of either of the constituent corporations so as to abate pending actions.³

§ 90. *Procedure regarding Pending Suits.*—It seems the better view that, in a pending action, upon proof of the fact of consolidation being made, the action may be proceeded with against the new company by amendment and that new process is not necessary to bring the consolidated company before the

¹ *Kinion v. Kansas City, etc. R. Co.*, 39 Mo. App. 382 (1889).

² *New York. Railroad Law*, § 73, (Birdseye's, R. S. 1896, p. 2554): "No action or proceedings in which either of such corporations is a party shall abate or be discontinued by such agreement or act of consolidation, but may be conducted to final judgment in the names of such corporations, or such new corporation may be, by order of the court, on motion, substituted as a party." For other similar provisions, see statutes referred in note to § 79 *ante*.

³ *Baltimore, etc. R. Co. v. Musselman*, 2 Grant's Cas. (Pa.) 352 (1857): "But without any such provision as the above, in the law authorizing the consolidation, a court of justice would not consider the mere voluntary union of several corporations into one as equivalent to the death of either of them; or attribute to the law-making power an intention of enabling them to discharge their liabilities in such a summary way."

In *Kansas*, however, the exceptional view is taken that, since upon consolidation a constituent corporation is dissolved and ceases to exist as a corporation, an action brought by or against it before consolidation cannot after-

wards be prosecuted by or against it in its original name.

Thus in *Kansas, etc. R. Co. v. Smith*, 40 Kan. 192 (1888), (19 Pac. Rep. 636), the Court said: "On May 31, 1886, when the Kansas, Oklahoma and Texas Railway Company consolidated with the other companies, it ceased to exist as a corporation. And everything which has since transpired upon the basis of the aforesaid railway company's being a corporation—indeed everything which has transpired in this case since May 31, 1886, is void. . . . This case is where the original party has ceased to exist, has become defunct, is dead, and therefore not able either to prosecute or defend."

Also *Cunkle v. Interstate R. Co.*, 54 Kan. 194 (1894), (40 Pac. Rep. 184); *Chicago, etc. R. Co. v. Butts*, 55 Kan. 660 (1895), (41 Pac. Rep. 948); *Council Grove, etc. R. Co. v. Lawrence*, 8 Kan. App. 274 (1895), (45 Pac. Rep. 125).

See also *Indianola R. Co. v. Fryer*, 56 Tex. 609 (1882), where the Court said that a judgment rendered against a constituent corporation after consolidation was a nullity.

court. Technically speaking and for general purposes the consolidated company is a new corporation, but touching the business of the old companies and the rights of their creditors, it ought properly to be regarded as the successor of the old companies under a new name; and to that extent it ought not to be regarded as a new corporation. If it is the same corporation, under a different name, an additional summons is unnecessary.¹

On the other hand, however, it was held by the Supreme Court of Georgia that it was error to permit the plaintiff to take judgment against a consolidated company, without taking proper steps to bring the new corporation, as such, before the court—including the issue of new process.²

§ 91. *Allegation and Proof of Consolidation.*—In order to charge a consolidated company or to enable it to recover in an action pending at the time of consolidation by or against a constituent company, the plaintiff must regularly allege the fact of consolidation and the successorship of the new company to the rights or liabilities of such constituent company and must prove the same, unless duly admitted. The court cannot take judicial notice of consolidation.³

¹ *Kinion v. Kansas City, etc. R. Co.*, 39 Mo. App. 386 (1889): "Under this view it was not necessary to bring the defendant into court by a new summons, and the simple and direct act of substitution was right. If John Smith is sued, and during the pendency of the suit he has his name changed to John Jones, a claim that he, as John Jones, must be brought into court by additional summons would be somewhat novel. Practically that is this case."

In *Louisville, etc. R. Co. v. Summers*, 131 Ind. 241 (1892), (30 N. E. Rep. 873), an action against a railroad company for negligence, it was shown, *after a verdict* for plaintiff, that the defendant and certain other railroad companies had consolidated and formed a new company, which had succeeded to all the rights and liabilities of the consolidating companies. *It was held* that the trial court properly substituted the consolidated company as defendant.

² *Selma, etc. R. Co. v. Harbin*, 40 Ga. 706 (1870).

It has been held that the consolidated company should not be substituted in place of the old company when the report of the referee has been made before consolidation. It was also held in the same case that the holder of preferred stock in a constituent company, in enforcing his claims thereon, stands in a different position from a creditor of such company. *Prouty v. Lake Shore, etc. R. Co.*, 52 N. Y. 363 (1873).

The substitution of the consolidated company in pending proceedings is often provided for in consolidation statutes. See statutes referred to in note to § 79, *ante*.

³ *Southgate v. Atlantic, etc. R. Co.*, 61 Mo. 90 (1875). In *Brown v. Dibble*, 65 Mich. 520 (1887), (32 N. W. Rep. 656) it was held that it would not be presumed that a foreign constituent corporation had power to consolidate.

Statutes providing that an allegation of corporate capacity shall be taken as true unless specifically denied do not apply to an allegation in a complaint that the defendant corporation consolidated with another company before the commencement of the suit.¹ An allegation in a complaint that certain railroad companies, authorized by law to consolidate, did consolidate and become one corporation under a certain name, is a sufficient averment of consolidation without setting forth, in detail, the steps taken by the constituent companies to bring about such result.² The facts concerning the consolidation should, however, be set forth with reasonable certainty,³ although their absence from a petition would not occasion a reversal of judgment.⁴

Consolidation statutes sometimes provide that a copy of the articles of consolidation on file in the office of the Secretary of State, duly certified and authenticated, shall be *prima facie* evidence of consolidation.⁵ In the absence of such a statutory

¹ *Koons v. Chicago, etc. R. Co.*, 23 Iowa, 493 (1867).

² *Collins v. Chicago, etc. R. Co.*, 14 Wis. 495 (1861): "Now although these allegations in respect to the consolidation of the various companies are quite general we do not see how they could be made more specific, without setting forth in detail all the steps taken by the different companies to effect their consolidation and make it complete. . . . We therefore think the averments of the complaint should be deemed sufficiently explicit, on demurrer. They must be considered as equivalent to alleging that everything was done, and every step taken by the various companies to render their acts of consolidation complete and effectual." As to pleadings concerning consolidation in *quo warranto* proceedings see *Commonwealth v. Atlantic, etc. R. Co.*, 53 Pa. St. 9 (1866).

³ *Hubbard v. Chappell*, 14 Ind. 601 (1860); *Wright v. Bundy*, 11 Ind. 398 (1858); *Marquette, etc. R. Co. v. Langton*, 32 Mich. 251 (1875); *Langhorne v. Richmond R. Co.*, 91 Va. 369 (1892), (22 S. E. Rep. 159). In the last case

the Court said (p. 375): "In this case, as the plaintiff had instituted his action to recover damages from the consolidated corporation for the injury alleged to have been done him by the corporation consolidated with it, it was necessary for him to allege generally the authority of the old companies to consolidate, and the fact that they had consolidated, and under what name, in order to show the liability of the new or consolidated company for the injury sued for."

⁴ *Indianapolis, etc. R. Co. v. Jones*, 29 Ind. 465 (1868).

⁵ "A copy of said agreement and act of consolidation, duly certified by the Secretary of the State under his official seal, shall be evidence in all courts and places of the existence of said new company and that the provisions of this act have been fully observed and complied with." *Connecticut*, Rev. Stat. 1888, § 3445. Other States have somewhat similar statutory provisions.

A copy of articles of consolidation, duly certified under the seal of the Secretary of State, is *prima facie* evidence

provision the existence of a consolidated corporation could, undoubtedly, be proved in the same manner as the existence of any other corporation — by showing the due execution and record of the consolidation agreement in pursuance of statutory authority, and acts of *user* thereunder.

CHAPTER IX.

IRREGULAR AND INVALID CONSOLIDATIONS.

- § 92. Attempted Consolidation — *Status* of Resulting Organization.
- § 93. Effect of Unlawful Consolidation.
- § 94. Effect of Irregular Consolidation.
- § 95. Who may attack Irregular Consolidation.
- § 96. Estoppel to deny Regularity of Consolidation.
- § 97. Accounting after Attempted Consolidation.
- § 98. Fraud in Consolidation Agreement.

§ 92. *Attempted Consolidation — Status of Resulting Organization.* — When a consolidation of corporations has been attempted but the result of the proceedings, through some defect or want of power, has not been a corporation *de jure*, the rights and obligations accruing will be determined by ascertaining whether a *de facto* corporation has been formed. Unless a consolidation statute, in force at the time of the proceedings,¹ authorized the proposed consolidation, the result was a nullity even if there was an attempt in good faith to consolidate followed by an assumption of corporate powers.² An

of the existence of the consolidated corporation. *East St. Louis, etc. R. Co. v. Wabash, etc. R. Co.*, 24 Ill. App. 279 (1887). See also *Columbus, etc. R. Co. v. Skidmore*, 69 Ill. 566 (1873).

¹ The subsequent passage of a consolidation statute, not retroactive in terms, does not validate an illegal consolidation nor create a *de facto* corporation. *American Loan, etc. Co. v. Minnesota, etc. R. Co.*, 157 Ill. 641 (1895), (42 N. E. Rep. 153).

² *American Loan, etc. Co. v. Minne-*

sota, etc. R. Co., 157 Ill. 641 (1895), (42 N. E. Rep. 153): "In order that there should be a *de facto* corporation two things are essential: First, there must be a law under which the corporation might lawfully be created; and second, a *user*. When the law authorizes a corporation, and there is an attempt, in good faith, to organize, and corporate functions are thereupon exercised, there is a corporation *de facto*, the legal existence of which cannot ordinarily be questioned collaterally. . . .

attempt to do that which the law does not permit can produce no result that the law will recognize. A body which cannot become a corporation *de jure* cannot become a corporation *de facto*. Moreover, the mere *user* of corporate powers which might have been lawfully acquired, without a *bona fide* attempt to acquire them by forming a consolidation, does not create a consolidated corporation *de facto* nor does an attempt to organize without *user* have that effect. All of these elements must unite to form a *de facto* corporation, — (a) a statute under which the proposed consolidation might have been effected, (b) a *bona fide* attempt to consolidate, and (c) a *user* of the corporate powers claimed.¹

§ 93. **Effect of Unlawful Consolidation.** — As already noticed, the result of an attempted consolidation, when no statute authorizes consolidation, is a nullity, and the same result follows when the other elements of a *de facto* corporation are lacking. Accordingly, the corporate existence of a nominally

Our attention is called to no case in which it is held that, in the absence of any general law or special charter or other law authorizing incorporation or consolidation, as the case may be, and also in the absence of subsequent legislative ratification, the juristic personality of a corporation or consolidated corporation is complete and conclusive against all the world except the sovereign power. For the reasons we have stated the supposed consolidated corporation of the States of Wisconsin, Minnesota and Illinois called the Chicago Freeport and St. Paul Railroad Company, is not, and never was, a corporation either *de facto* or *de jure*. The right of way contracts and the trust deed made to the appellant were and are invalid, and this because there was no corporation in existence with capacity to either obtain a right of way, or contract, or act or be bound."

¹ In *Methodist, etc. Church v. Pickett*, 19 N. Y. 482 (1859), it was said that the following elements were essential to the existence of a *de facto* corporation: "(1) The existence of a charter or some law under which a corporation,

with the powers assumed, might lawfully be created; and (2) a *user* by the party to the suit of the rights claimed to be conferred by such charter or law." This statement has, however, been criticized as omitting the element of an *attempt to organize*. *Finnegan v. Norrenberg*, 52 Minn. 239 (1893), (53 N. W. Rep. 1150). In *Continental Trust Co. v. Toledo, etc. R. Co.*, 82 Fed. 653 (1897), Judge Taft in considering what attempts at consolidation created a corporation *de facto*, stated the following conclusion, which seems subject to the same objection as that in *Methodist, etc. Church, v. Pickett*, *supra*: "It may be safely stated as the rule, that when persons assume to act as a body, and are permitted by acquiescence of the public and of the State to act as if they were legally a particular kind of corporation, for the organization, existence and continuance of which there is express recognition by general law, such body of persons is a corporation *de facto*, although the particular persons thus exercising the franchise of being a corporation may have been ineligible and incapacitated by the law to do so."

consolidated corporation, formed in the absence of legislative authority for such a consolidation, may be collaterally attacked, its acts and contracts are void,¹ and it cannot be held liable for the debts of one of the corporations attempting to consolidate.² So it was held, where two corporations were consolidated, without legislative authority, that promissory notes executed by the consolidated organization for purposes beyond the powers of the constituent companies were not binding upon them after such organization had been dissolved.³ Where, however, after a valid consolidation of two corporations had been effected, the consolidated corporation thus created attempted to further absorb, without authority, a third corporation and, thereafter, executed a mortgage upon all its property, it was held that the illegality of the latter consolidation did not affect the mortgage lien upon the property of the first two corporations.⁴

A judgment, obtained against a consolidated corporation which is thereafter declared illegal, may be enforced against the constituent companies, upon the theory that they were the real defendants under the assumed name.⁵ A constituent railroad corporation, after an illegal consolidation, is liable for injuries, received by a passenger while upon its railroad, caused by the negligent operation of the railroad by the employees of the consolidated company.⁶

¹ *American Loan, etc. Co. v. Minnesota, etc. R. Co.*, 157 Ill. 641 (1895), (42 N. E. Rep. 153).

² *Kavanaugh v. Omaha Life Assn.*, 84 Fed. 295 (1897).

³ Where two separate corporations were created to build railroads, they had no right to unite and conduct their business under one management; nor had they a right to establish a steamboat line to run in connection with the railroads. Notes given for the purchase of the steamboat cannot be recovered upon. So held in *Pearce v. Madison, etc. R. Co.*, 21 How. (U. S.) 441 (1858).

⁴ *Racine, etc. R. Co. v. Farmers Loan, etc. Co.*, 49 Ill. 331 (1868).

⁵ *Ketcham v. Madison, etc. R. Co.*, 20 Ind. 260 (1863).

⁶ *Latham v. Boston, etc. R. Co.*, 38 Hun (N. Y.), 267 (1885): "The defendant was one of the constituent companies out of which the association was formed which was entitled to be a new company. As this association has been adjudged to have had no legal capacity to exist as a corporation, it follows, as was also adjudged, that the individual entity of the defendant was not merged in it. Therefore, the defendant remained as an actor and participator in the association which did operate the railway, and thus one of the parties by whose negligence the plaintiff was injured. As such it was severally liable as one of the wrongdoers."

An attempted consolidation, without authority, does not terminate the existence of a corporation, and *non-user* of its franchises, during the existence of the illegal organization, does not forfeit them.¹

§ 94. **Effect of Irregular Consolidation.** — If, upon the principles indicated, the result of an attempted consolidation is a corporation *de facto*, the general rule that the existence of such a corporation cannot be made the subject of collateral attack is applicable.² As said by the Supreme Court of the United States in the *Pacific Railroad Removal Cases*:³ “The organization of the company under the consolidation proceedings makes it, at least, a corporation *de facto* and the legality of its constitution will not be inquired into collaterally.”

Thus, after consolidation has taken place, it is no defence to an action brought upon an obligation given to the consolidated company that prescribed formalities were omitted in the consolidation proceedings.⁴ Upon similar principles, it has been held that the existence of a *de facto* consolidated corporation cannot be attacked in an action of ejectment in order to disprove title in a plaintiff who claims through such corporation.⁵

§ 95. **Who may attack Irregular Consolidation.** — The State

¹ *State v. Crawfordsville, etc. Turnpike Co.*, 102 Ind. 283 (1885), (1 N. E. Rep. 395).

² *Pacific Railroad Removal Cases*, 115 U. S. 15 (1885), (5 Sup. Ct. Rep. 1113); *Continental Trust Co. v. Toledo, etc. R. Co.*, 82 Fed. 642 (1897); *Farmers Loan, etc. Co. v. Toledo, etc. R. Co.*, 67 Fed. 49 (1895). Also, *Washburn v. Cass County*, 3 Dill. (U. S.) 251 (1875); *Leavenworth County v. Chicago, etc. R. Co.*, 25 Fed. 219 (1885).

³ *Pacific Railroad Removal Cases*, 115 U. S. 15 (1885), (5 Sup. Ct. Rep. 1113).

⁴ Where a party executed and delivered his promissory note to a consolidated organization which was afterwards assigned by it, it was held in an action upon such note by the assignee against the maker, that the defendant, by executing his note to

the corporation, thereby admitted its corporate existence, and, in order to avoid a payment for want of a party with whom to contract, he must prove that no such body existed in fact; and that under a plea of *nulla tiel corporation* where an organization in fact, and a user is shown, the existence of the corporate body is proved. *Mitchell v. Deeda*, 49 Ill. 416 (1867).

See also *Continental Trust Co. v. Toledo, etc. R. Co.*, 82 Fed. 642 (1897); *Branch v. Jesup*, 106 U. S. 468 (1882), (1 Sup. Ct. Rep. 495).

⁵ Where title is traced through a consolidated corporation which is not a party to the record and with which the defendant has no privity, proof of its existence as a corporation *de facto* by the articles of incorporation duly made is sufficient *prima facie*. *Tarpey v. Deseret Salt Co.*, 5 Utah 494 (1888), (17 Pac. Rep. 631).

may directly attack the regularity of the organization of a *de facto* consolidated corporation in *quo warranto* proceedings.¹

A subscriber to the stock of a constituent corporation, when sued by the consolidated corporation upon his subscription contract, may show the omission of some statutory condition precedent in the consolidation proceedings.² This is an exception to the rule against the collateral attack of *de facto* corporate existence and is justified by the relation of the parties.

The decision of the Supreme Court of Michigan, in *Brown v. Dibble*,³ which, if well founded, practically nullifies the rule, cannot, however, be sustained upon the same ground. In that case it was held that when a consolidated corporation seeks to enforce rights against third persons, as the successor of its constituents, the question can be raised whether it has, in fact, been duly organized and has succeeded to the rights claimed.

§ 96. *Estoppel to deny Regularity of Consolidation.* — While subscribers to the stock of constituent corporations may question the regularity of the consolidation, when sued by the consolidated company upon their subscriptions, a different principle may be applicable when creditors of that company

¹ *State v. Vanderbilt*, 37 Ohio St. 590 (1882); *Commonwealth v. Atlantic, etc. R. Co.*, 53 Pa. St. 9 (1866).

² Thus, where the consolidation act provided for the consolidation of corporations upon the approval of the agreement of consolidation by the constituent corporations, and required the election of a board of directors of the consolidated corporation as a condition to its succession to the rights and privileges of the constituent corporations, it was held that it might be shown by a subscriber, in action to enforce his subscription, that the consolidated corporation had not succeeded to such rights on account of its failure to comply with such condition. *Mansfield, etc. R. Co. v. Drinker*, 30 Mich. 124 (1874).

See also *Mansfield, etc. R. Co. v. Stout*, 26 Ohio St. 241 (1875); *Tuttle v. Michigan Air Line, etc. Co.*, 35 Mich. 249 (1877); *Mansfield, etc. R. Co. v.*

Brown, 26 Ohio St. 223 (1875). The contrary is, however, held in Kansas. See *Chicago, etc. R. Co. v. Stafford County*, 36 Kan. 128 (1887), (12 Pac. Rep. 593), (mandamus to enforce subscription), where the Court said: "As the plaintiff is a *de facto* corporation, under the decisions of this court its existence as such corporation can only be attacked in a direct proceeding brought for that purpose. Such matter cannot be inquired into collaterally."

³ *Brown v. Dibble*, 65 Mich. 523 (1887), (32 N. W. Rep. 656): "Unless the consolidation is shown to be the legally created successor of the old Michigan Company it has no concern with its individual contracts with third persons; and if so identified it can only have . . . a right to recover by proof that all conditions of recovery have been complied with."

seek to reach such subscriptions for the payment of its debts. In such a case subscribers who have acquiesced in the consolidation are estopped to question its validity.¹

A *de facto* consolidated corporation is estopped from denying its corporate existence in order to avoid its obligations.² In *Farmers Loan, etc. Co. v. Toledo, etc. R. Co.*³ Judge Taft said: "It is too well established to need discussion that both a *de facto* corporation and the persons exercising the rights of stockholders in such a corporation are estopped to assert its unauthorized existence as a corporation to avoid a debt incurred by it in the actual exercise of corporate franchises and the doing of corporate business."

Creditors of a *de facto* consolidated corporation who have dealt with it as a corporation and whose claims have arisen after the issuance of mortgage bonds, are estopped from attacking the regularity of its organization for the purpose of invalidating the bonds.⁴ As creditors they have no better standing than the bondholders.

Upon similar principles it would seem that creditors of an

¹ *Hamilton v. Clarion, etc. R. Co.*, 144 Pa. St. 34 (1891), (23 Atl. Rep. 53).

² *United States v. Farmers Loan, etc. Co. v. Toledo, etc. R. Co.*, 67 Fed. 49 (1895).

Illinois v. Racine, etc. R. Co. v. Farmers Loan, etc. Co., 49 Ill. 347 (1868): "Where a company has issued its bonds and mortgage under the circumstances above detailed, the courts of every civilized country must hold an estoppel from denying its corporate existence, for such a defence is repugnant to every sentiment of justice and good faith. That this doctrine of equitable estoppel, or estoppel *in pais*, by which a person who has represented to another the existence of a certain state of facts, and thereby induced him to act on the faith of their existence, is concluded from averring against such person and to his injury that such representations were false, is as applicable to corporations as to natural persons, will hardly be denied."

A corporation which has, in effect, consolidated with another, is estopped to assert that the proceedings for consolidation were irregular, in an action against it to recover the amount of a judgment against the other corporation binding upon it if there was a consolidation. *Chicago, etc. R. Co. v. Ashling*, 160 Ill. 373 (1896), (43 N. E. Rep. 373).

New Jersey v. Williamson v. New Jersey Southern R. Co., 26 N. J. Eq. 398 (1875).

Ohio v. Adelbert University v. Toledo, etc. R. Co., 3 Ohio N. P. 15 (1894).

³ *Farmers Loan, etc. Co. v. Toledo, etc. R. Co.*, 67 Fed. 49 (1895).

⁴ *Louisville Trust Co. v. Louisville, etc. R. Co.*, 84 Fed. 539 (1898), (reversed on other grounds, 174 U. S. 674 (1899), (19 Sup. Ct. Rep. 827), distinguishing *American Loan, etc. Co. v. Minnesota, etc. R. Co.*, 157 Ill. 641 (1895), (42 N. E. Rep. 153).

Also *Continental Trust Co. v. Toledo, etc. R. Co.*, 82 Fed. 648 (1897).

illegal consolidated corporation could not attack its validity in order to defeat the holders of prior securities. If the corporation is a nullity its bonds and unsecured debts are equally invalid.¹

Principles of estoppel may also prevent the stockholders² and bondholders³ of the consolidated corporation, and the constituent corporations⁴ and their stockholders⁵ from raising any questions as to the regularity of the consolidation.

¹ *Continental Trust Co. v. Toledo, etc. R. Co.*, 82 Fed. 648 (1897) (*per Taft J.*): "Let us consider first the averment that the Toledo, St. Louis & Kansas City Railroad Company is neither a corporation *de jure* nor a corporation *de facto*. Can such a defence be urged by one purporting to be creditor of the pretended corporation? If the bonds are null and void because the corporation issuing them was a nullity, clearly the debts of the petitioners and the complainant are in no better condition and the court has nothing upon which to exercise its jurisdiction." See also *Louisville Trust Co. v. Louisville, etc. R. Co.*, 84 Fed. 539 (1898).

² It has been held that a subscriber for stock in a consolidated company cannot attack the validity of its organization on the ground that it embraces parallel roads. *Leavenworth County v. Barnes*, 94 U. S. 70 (1876); *Lewis v. City of Clarendon*, 5 Dill. (U. S.) 329 (1878), (6 Rep. 609).

Subscribers for stock in *consolidating* companies, can, however, enjoin a consolidation of parallel roads when prohibited by statute or constitutional provision. See *ante*, § 40: "*Remedies for Enforcement of Provisions against Consolidation.*"

³ *Wallace v. Loomis*, 97 U. S. 155 (1877): "In view of these facts, we think that the appellant is estopped from denying the corporate existence of the com-

pany whose bonds he thus holds, and by virtue of which he acquires a *locus standi* in the suit. Irregularities and even fraud committed in making the purchase authorized by the act, and failure to perform strictly all the requisites for changing the company's name, cannot avail the appellant, occupying the position he does in this suit, to deny the corporate existence of the Alabama and Chattanooga Railroad Company. He waived all such objections when he took the bonds, and came into court only as a holder and owner thereof. The irregularities on which he relies might, perhaps, have been sufficient cause for a proceeding on the part of the State to deprive the company of its franchises, or on the part of third persons who may have been injuriously affected by the transactions. But neither the State nor any other persons have complained; and it is not competent for the appellant to raise the question in this collateral way, for the purpose of gaining some supposed advantage over other creditors of the same company, who have relied on its corporate existence in the same manner that he has done."

⁴ A corporation which has voluntarily become consolidated with another, has participated in all the necessary proceedings in such consolidation, and has permitted the *de facto* corporation so formed to control its business and

⁵ *Bell v. Pennsylvania, etc. R. Co.* (N. J. 1887), 10 Atl. Rep. 741; *Lewis v. City of Clarendon*, 5 Dill. (U. S.) 329 (1878), (6 Rep. 609).

In the latter case the Court said: "By subscribing for stock and issuing its bonds under the circumstances to the consolidated company the city is

§ 97. **Accounting after Attempted Consolidation.** — While an attempted consolidation, without statutory authority, is *ultra vires* and no action will lie upon the agreement of consolidation, one corporation which has received, under the agreement, property of another can be compelled to make restitution thereof or to account for its value.¹ Thus, where a bill in equity, brought to restrain an *ultra vires* consolidation, was dismissed because of the voluntary rescission of the articles of consolidation, a cross bill praying for an accounting was permitted to stand and the suit remained for the purpose of such accounting. In this case the Supreme Court of Mississippi said: "The decided weight of authority in England and America is that no action lies upon the invalid contract, that no decree can be made by a court of equity for its specific performance, nor can a recovery be had at law for its breach; but that, by proceeding in the proper court, the plaintiff may recover to the extent of the benefit received by the defendant from the execution of the agreement by the plaintiff."²

§ 98. **Fraud in Consolidation Agreement.** — Courts of equity will annul any scheme by which the stockholders of one corporation, after agreeing to consolidate their corporation with another, fraudulently seek to gain an advantage over the

property and third parties to acquire rights and interests based on the existence of such *de facto* corporation, cannot sue to have such consolidation declared invalid by reason of irregularities in its formation. *Bradford v. Frankfort, etc. R. Co.*, 142 Ind. 383 (1895), (40 N. E. Rep. 471).

See also *Carey v. Cincinnati, etc. R. Co.*, 5 Iowa, 357 (1857); *Dimpfel v.*

Ohio, etc. R. Co., 9 Biss. (U. S.) 127 (1879).

¹ For full consideration of the subject of *ultra vires* contracts and of the rights and duties of the parties thereto, see *post*, ch. 22.

² *Greenville Compress Co. v. Planters Compress, etc. Co.*, 70 Miss. 676 (1893), (13 So. Rep. 879).

estopped in a suit upon such bonds from showing that the latter company is not a corporation *de jure*."

Where the validity of a consolidation has not been attacked by the State or a dissenting stockholder, a municipal corporation cannot question it by way of a defence to an action on bonds issued to a constituent corporation. *Washburn v. Cass County*, 3 Dill. (U. S.) 251 (1875).

It has been held, however, that the holder of bonds issued by a county to a railroad company, two days after an attempted consolidation with another company, was not estopped, as against the county, from asserting the invalidity of such consolidation. *Morrill v. Smith County*, 89 Tex. 529 (1896), (36 S. W. Rep. 56).

shareholders of the latter company. Thus, where one corporation, after agreeing to a consolidation, declared a scrip dividend and issued certificates of indebtedness therefor without the knowledge of the other corporation which then went into the consolidation, it was held, in a suit in equity brought by the stockholders of the latter company, that the scrip was fraudulent and void and should be delivered up to be cancelled.¹

A secret agreement between the promoters of a consolidation that the money advanced for the purchase of certain stock, necessary to effect the consolidation, should be a debt of the consolidated company, and be repaid by an issue of its bonds, is not binding upon the consolidated company and the proceeds of bonds so applied may be recovered.²

Upon grounds of public policy, it has been held that arrangements for consolidation between two corporations may be set aside in equity where one person is director in both companies.³

CHAPTER X.

INTERSTATE CONSOLIDATIONS.

- § 99. Consolidation of Corporations of Different States — How authorized.
- § 100. Construction of Interstate Consolidation Statutes.
- § 101. *Status* of Interstate Consolidated Corporation.
- § 102. Effect of Interstate Consolidation upon *Status* of Constituent Corporations.
- § 103. Management of Interstate Consolidated Corporation.
- § 104. Rights and Powers of Interstate Consolidated Corporation.
- § 105. Duties of Interstate Consolidated Corporation — Taxation.
- § 106. Citizenship of Interstate Consolidated Corporation.
- § 107. Foreclosure of Mortgages after Interstate Consolidation. Jurisdiction.

§ 99. Consolidation of Corporations of Different States — How authorized. — Consolidation statutes generally provide for the

¹ *Bailey v. Citizens Gas Light Co., Midland R. Co.*, 38 N. J. Eq. 423 27 N. J. Eq. 196 (1876).

Equity, however, cannot *dissolve* a consolidated corporation upon the ground, alleged by a stockholder in a constituent corporation, that the consolidation was for a fraudulent purpose, and not legally effected. *Terhune v.*

² *Trenton Pass. R. Co. v. Wilson*, 55 N. J. Eq. 273 (1897), (37 Atl. Rep. 476).

³ *Munson v. Syracuse, etc. R. Co.*, 103 N. Y. 73 (1886), (8 N. E. Rep. 355). Compare, however, *Hill v. Nisbet*, 100 Ind. 341 (1884).

consolidation of domestic railroad and other carrier corporations with those of an adjoining State where the works of the several corporations, when united, will form a continuous or connected line. The connection between the railroads may in some States be by a bridge, in others by a ferry and in another by a tunnel.¹ One State, at least, has no general act permitting the consolidation of domestic railroad companies but authorizes the consolidation of any railroad company incorporated under its laws with any other corporation whose line of railroad "is situated wholly outside this State."² As already shown, State legislation authorizing the consolidation of such corporations is not a regulation of interstate commerce.³

The consolidation of domestic and foreign *business* corporations is not, as a rule, permitted by consolidation statutes applicable to that class of corporations.

§ 100. *Construction of Interstate Consolidation Statutes.* — Express legislative authority, from each of the States creating the several corporations proposing to consolidate, must be granted before a valid consolidation can take place. Any ambiguity in the terms of the grant will operate against the corporation and in favor of the public.

A legislative grant of authority to consolidate does not authorize consolidation with a foreign corporation unless such power is clearly expressed.⁴ It has, however, been held that an act authorizing a domestic railroad corporation to consolidate with corporations operating roads in an adjoining State, authorizes a consolidation with a company operating, in an adjoining State, a road which extends into a third State.⁵

¹ See *ante*, § 22: "*What Railroads may consolidate — Statutory Provisions.*"

² *Connecticut*: Gen. Stat. 1888, § 3443.

³ See *ante*, § 19: "*Power of Legislature to authorize Consolidation.*"

⁴ *American Loan, etc. Co. v. Minnesota, etc. R. Co.*, 157 Ill. 641 (1895), (42 N. E. Rep. 153). See also *Continental Trust Co. v. Toledo, etc. R. Co.*, 82 Fed. 642 (1897). In *Black v.*

Delaware, etc. Canal Co., 24 N. J. Eq. 456 (1873), it was held, in the analogous case of a lease, that power to lease to "any other corporation or otherwise" did not authorize a lease to a foreign corporation.

⁵ *Adelbert College v. Toledo, etc. R. Co.*, 3 Ohio N. P. 15 (1894). See also *Racine, etc. R. Co. v. Farmers Loan, etc. Co.*, 49 Ill. 331 (1868).

Power to purchase stock in "any other connecting railroad" authorizes the purchase of the stock of a foreign connecting railroad,¹ and legislative consent to a purchase by "any railroad company" includes foreign as well as domestic railroad corporations.²

§ 101. **Status of Interstate Consolidated Corporation.** — A State may grant to a corporation of another State power to lease or purchase a railroad within its territory, and to maintain and operate it, without making such corporation a domestic corporation or a citizen of such State.³

¹ Pittsburgh, etc. R. Co. v. Keokuk, etc. Bridge Co., 131 U. S. 371 (1889), (9 Sup. Ct. Rep. 770); Day v. Ogdensburg, etc. R. Co., 107 N. Y. 129 (1887), (13 N. E. Rep. 765).

² Boston, etc. R. Co. v. Boston, etc. R. Co., 65 N. H. 393 (1888), (23 Atl. Rep. 529): "Express consent is given to a purchase by "any railroad company." Taken without qualification, this clause includes foreign as well as domestic railroad corporations. The words "any railroad" might be used in a connection and for a purpose which would show a restricted sense not including foreign companies. Here is no evidence of a purpose to exclude them."

³ I. It is competent for a railroad company, when authorized by the State creating it, to accept a grant of authority from another State to extend its railroad into such State, and to receive a grant of powers to own or control, by lease or purchase, railroads of other corporations therein, and it may subject itself to such rules and regulations as may be prescribed by the second State. Such legislation is not regarded as within the constitutional inhibition against compacts between States. St. Louis, etc. R. Co. v. James, 161 U. S. 562 (1896), (16 Sup. Ct. Rep. 621); Railroad Co. v. Harris, 12 Wall. (U. S.) 82 (1870); Copeland v. Memphis, etc. R. Co., 3 Woods (U. S.) 651 (1878).

II. The conclusive presumption for jurisdictional purposes, applicable to all corporations, that a corporation is com-

posed of citizens of the State which created it, accompanies the corporation when transacting business in another State, and it may sue and be sued in the federal courts of such other State as a citizen of the State of its original creation. St. Louis, etc. R. Co. v. James, 161 U. S. 562 (1896), (16 Sup. Ct. Rep. 621); Shaw v. Quincy Mining Co., 145 U. S. 444 (1892), (12 Sup. Ct. Rep. 935); Interstate Commerce Com. v. Texas, etc. R. Co., 57 Fed. 948 (1893); Myers v. Murray, etc. Co., 43 Fed. 695 (1890); Miller v. Wheeler, etc. Co., 46 Fed. 882 (1891); Copeland v. Memphis, etc. R. Co., 3 Woods (U. S.) 657 (1878). This doctrine of indisputable citizenship does not, however, extend so far as to make such a corporation a citizen of the second State even though it be there endowed with all the powers and privileges usually granted to domestic corporations. St. Louis, etc. R. Co. v. James, 161 U. S. 562 (1896), (16 Sup. Ct. Rep. 621).

III. The second State may create a corporation of the same name as the corporation of the other State, and may declare that the same legal entity shall be a corporation of that State and shall be entitled to exercise within its borders, by the same officers, all its corporate functions. The decided weight of authority supports the view that the result of such legislation is not the creation of a single corporation, but two corporations of the same name having a different paternity and being citizens, respectively, of the States creating them.

When corporations of different States desire to consolidate, and to acquire the rights and privileges of that relation, the consolidated corporation, created by the necessary co-operative legislation, is essentially different from a corporation created by the consolidation of domestic corporations. A corporation formed by the consolidation of corporations of different States, although it has the same shareholders, is designed to accomplish the same purpose, and has the same powers, in each State, is a separate and distinct corporation in each State and exists in each State as a domestic corporation.¹ In *Quincy Railroad Bridge Co. v. Adams County*,² the

Ohio, etc. R. Co. v. Wheeler, 1 Black (U. S.) 286 (1861). See also *Muller v. Dows*, 94 U. S. 444 (1876); *Pennsylvania R. Co. v. St. Louis, etc. R. Co.*, 118 U. S. 290 (1885), (6 Sup. Ct. Rep. 1094); *Nashua, etc. R. Corp. v. Boston, etc. R. Corp.*, 136 U. S. 356 (1889), (10 Sup. Ct. Rep. 1004); *Racine v. Farmers Loan, etc. Co.*, 49 Ill. 348 (1868); *Missouri Pac. R. Co. v. Meeh*, 69 Fed. 755 (1895).

Contra, *Railroad Co. v. Harris*, 12 Wall. (U. S.) 82 (1870); *Copeland v. Memphis, etc. R. Co.*, 3 Woods (U. S.) 651 (1878); *Bishop v. Brainerd*, 28 Conn. 289 (1859).

¹ *United States*: In *Muller v. Dows*, 94 U. S. 447 (1876), where a Missouri and an Iowa corporation had consolidated, the Supreme Court of the United States said: "The two companies became one. But in the State of Iowa it was an Iowa corporation, existing under the laws of that State alone. The laws of Missouri had no operation in Iowa."

Also *Nashua, etc. R. Corp. v. Boston etc. R. Corp.*, 136 U. S. 381 (1890), (10 Sup. Ct. Rep. 1004); *Peik v. Chicago, etc. R. Co.*, 94 U. S. 177 (1876); *Delaware R. R. Tax Cases*, 18 Wall. (U. S.) 206 (1873); *Railroad Co. v. Whitton*, 13 Wall. (U. S.) 271 (1871); *Missouri Pacific R. Co. v. Meeh*, 69 Fed. 755 (1895); *Fitzgerald v. Missouri Pacific R. Co.*, 45 Fed. 812 (1891); *Burger v. Grand Rapids, etc. R. Co.*, 22 Fed. 561 (1884).

Illinois: *Ohio, etc. R. Co. v. People*, 123 Ill. 467 (1888), (14 N. E. Rep. 874); *Quincy Railroad Bridge Co. v. Adams County*, 88 Ill. 615 (1878); *Racine, etc. R. Co. v. Farmers Loan, etc. Co.*, 49 Ill. 331 (1868).

Michigan: *Chicago, etc. R. Co. v. Auditor General*, 53 Mich. 91 (1884), (18 N. W. Rep. 586), (*per* Cooley, C. J.): "It is impossible to conceive of one joint act performed simultaneously by two sovereign States which shall bring a single corporation into being except it be by compact or treaty. There may be separate consent given for the consolidation of corporations separately created; but where the two unite, they severally bring to the new entity the powers and privileges already possessed, and the consolidated company simply exercises in each jurisdiction the powers the company there chartered had possessed."

Minnesota: *In re St. Paul, etc. R. Co.*, 36 Minn. 85 (1886), (30 N. W. Rep. 432).

Nebraska: *Trester v. Missouri Pac. R. Co.*, 33 Neb. 171 (1891), (49 N. W. Rep. 1110).

New York: *People v. New York, etc. R. Co.*, 129 N. Y. 474 (1892), (29 N. E. Rep. 361); *Sage v. Lake Shore, etc. R. Co.*, 70 N. Y. 220 (1877).

Pennsylvania: *Appeal of Pittsburgh, etc. R. Co.*, 4 Atl. Rep. 385 (1886).

² *Quincy Railroad Bridge Co. v. Adams County*, 88 Ill. 615 (1878).

Supreme Court of Illinois said: "The only possible *status* of a company acting under charters from two States is that it is an association incorporated in and by each of the States, and when acting as a corporation in either of the States, it acts under the authority of the charter of the State in which it is then acting and that only, the legislation of the other State having no operation beyond its territorial limits." And in *Fitzgerald v. Missouri Pacific R. Co.*,¹ Judge Caldwell said: "By the consolidation the corporation of one State did not become a corporation of another, nor was either merged in the other. The corporation of each State had a distinct legislative paternity, and the separate identity of each as a corporation of the State by which it was created, and as a citizen of that State, was not lost by the consolidation. Nor could the consolidated company become a corporation of three States without being a corporation of each, or of either. While the consolidated corporation is a unit, and acts as a whole in the transaction of its corporate business, it is not a corporation at large, nor is it a joint corporation of the three States. Like all corporations, it must have a legal dwelling-place. Every corporation, not created by act of Congress, dwells in a State. This consolidated corporation dwells in three States, and is a separate and single entity in each."

This principle that an interstate consolidated corporation is a separate and distinct entity in each State is clearly established, and is, perhaps, necessary in order to give each State its legitimate control over the charters which it grants. It is, however, founded, in a measure, upon a legal fiction for it makes several corporations out of that which is, in fact, one, and ignores the essential element of *union*.²

That the consolidated corporation, itself, has an existence apart from its constituents may be recognized without affecting the principles already considered. Thus in *Ashley v. Ryan*,³ the Supreme Court of Ohio said: "There has been

¹ *Fitzgerald v. Missouri Pacific R. Co.*, 45 Fed. 615 (1891).

² *Horne v. Boston etc. R. Co.*, 18 Fed. 50 (1883).

³ *Ashley v. Ryan*, 49 Ohio St. 529 (1892), affirmed 153 U. S. 436 (1894),

(14 Sup. Ct. Rep. 865).

some diversity of opinion as to the *status* of a corporation formed by the consolidation of companies under the laws of different States. But it seems pretty well settled, upon principle at least, that when formed under co-operative legislation of the different States, it becomes a corporation in each State where its road is located. It is a legal entity residing and doing business in different States, with a status in each, derived from and determined by the laws of that State."

It has also been held that a consolidated railroad corporation, chartered and operated in two States and made subject to the laws of one State as if wholly located therein, is a single entity so far as the power of the courts of that State to fix rates is concerned.¹ It is also held that the acts and neglects of an interstate consolidated corporation are its acts and neglects as a whole.²

Constitutional provisions in several States define the *status* of interstate consolidated corporations.³

¹ *Providence Coal Co. v. Providence, etc. R. Co.*, 15 R. L. 303 (1886), (4 Atl. Rep. 394).

² *Horne v. Boston, etc. R. Co.*, 18 Fed. 50 (1883). See also *Burger v. Grand Rapids, etc. R. Co.*, 22 Fed. 561 (1884); *Fitzgerald v. Missouri Pac. R. Co.*, 45 Fed. 812 (1891).

An interstate consolidated corporation is a "new" corporation whose charter, under Mich. Const. Art. 15, § 1, is subject to amendment, alteration or repeal. *Smith v. Lake Shore, etc. R. Co.*, 114 Mich. 460 (1897), 72 N. W. Rep. 328.

³ *Idaho*. Const. Art. XI. § 14: "If any railroad, telegraph, express, or other corporation, organized under any of the laws of this State, shall consolidate, by sale or otherwise, with any railroad, telegraph, express, or other corporation organized under any of the laws of any other State or Territory, or of the United States, the same shall not thereby become a foreign corporation; but the courts of this State shall retain jurisdiction over that part of the corporate property within the limits of the State in all matters that may arise,

as if said consolidation had not taken place."

Kentucky. Const. § 200: "If any railroad, telegraph, express, or other corporation, organized under the laws of this Commonwealth, shall consolidate, by sale or otherwise, with any railroad, telegraph, express, or other corporation organized under the laws of any other State, the same shall not thereby become a foreign corporation, but the courts of this Commonwealth shall retain jurisdiction over that part of the corporate property within the limits of this State in all matters which may arise, as if said consolidation had not taken place."

Louisiana. Const. Art. CCXLVI: "If any railroad company, organized under the laws of this State, shall consolidate, by sale or otherwise, with any railroad company organized under the laws of any other State or of the United States, the same shall not thereby become a foreign corporation, but the courts of this State shall retain jurisdiction in all matters which may arise, as if said consolidation had not taken place. In no case shall any consolida-

§ 102. **Effect of Interstate Consolidation upon Status of Constituent Corporations.** — Upon the creation of an interstate consolidated corporation the constituent corporations of the different States do not cease to exist, although they may lie dormant and their property, rights, powers and franchises be vested in and exercised by the consolidated corporation.¹ In *Racine, etc. R. Co. v. Farmers Loan etc. Co.*² the Supreme Court of Illinois said: "Our view of the effect of the consolidation between the [corporations of different States] which we hold to have been legally made, is briefly this: While it created a community of stock and of interest between the two companies, it did not convert them into one company, in the same way, and to the same degree, that might follow a consolidation of two companies within the same State. Neither Illinois nor Wisconsin, in authorizing the consolidation, can have intended to abandon all jurisdiction over its own corpo-

tion take place except upon public notice of at least sixty days to all stockholders, in such manner as may be provided by law."

Missouri. Const. Art. XII. § 18. Same as *Louisiana, supra*.

Montana. Const. Art. XV. § 15: "If any railroad, telegraph, telephone, express, or other corporation or company organized under any of the laws of this State shall consolidate, by sale or otherwise, with any railroad, telegraph, telephone, express, or other corporation organized under any of the laws of any other State or Territory, or of the United States, the same shall not thereby become a foreign corporation; but the courts of this State shall retain jurisdiction over that part of the corporate property within the limits of the State, in all matters that may arise, as if said consolidation had not taken place."

¹ *Ohio, etc. R. Co. v. People*, 123 Ill. 467 (1888), (14 N. E. Rep. 874); *Taggart v. Northern Central R. Co.*, 29 Md. 557 (1868); *Bishop v. Brainard*, 28 Conn. 289 (1859). Where two corporations are created by adjacent States, with the same name, to construct a

canal in each of the States and afterwards their interests are united by legislative acts of the States respectively, this does not merge the separate corporate existence of such corporations. *Farnum v. Blackstone Canal Co.*, 1 Sumn. (U. S.) 62 (1830). In *Nashua, etc. R. Co. v. Boston, etc. R. Co.*, 136 U. S. 382 (1890), (10 Sup. Ct. Rep. 1004), the Supreme Court of the United States said: "It is evident that, by the general law, railroad corporations created by two or more States, though joined in their interests, in the operation of their roads, in the issue of their stock, and in the division of their profits, so as practically to be a single corporation, do not lose their identity; and that each one has its existence and its standing in the courts of the country, only by virtue of the legislation of the State by which it is created. The union of name, of officers, of business and of property, does not change their distinctive character as separate corporations."

See also *Paul v. Baltimore, etc. R. Co.*, 44 Fed. 513 (1890).

² *Racine, etc. R. Co. v. Farmers Loan, etc. Co.*, 49 Ill. 348 (1868), (95 Am. Dec. 595).

ration created by itself. Indeed, neither State could take jurisdiction over the property or proceedings of the corporation beyond its own limits and a corporation can have no existence beyond the limits of the State sovereignty which brings it into life and endows it with its faculties and powers.”¹

§ 103. **Management of Interstate Consolidated Corporation.** — While a corporation created by the consolidation of corporations of different States is a domestic corporation of each State and derives its powers, in each State, from local laws, yet, in the conduct of its business, it acts as a unit, — as one corporation and not as several, — “and, in the absence of a statutory provision to the contrary, it may transact its corporate business in one State for all, and the contracts it enters into and the liabilities it incurs in one State are binding upon it in all the States and may be enforced against it in any one of them when the action is transitory.”²

A meeting in one of several States of the stockholders of a corporation created by the consolidation of corporations of those States is valid with respect to the property of the corporation in all of them, without the necessity of a repetition of such meeting in the other States.³

The affairs of an interstate consolidated corporation may be — and uniformly are — administered by a single board of directors which may control, manage and dispose of its property situated in the different States. In the case quoted from in the last section — *Racine, etc. R. Co. v. Farmers Loan, etc. Co.*⁴ — the Supreme Court of Illinois also said: “When continuous lines of road, passing through different States, are

¹ See *Ohio, etc. R. Co. v. Wheeler*, 1 Black (U. S.) 297 (1861); *Horne v. Boston, etc. R. Co.* 18 Fed. 50 (1883).

² *Fitzgerald v. Missouri Pacific R. Co.*, 45 Fed. 816 (1891) (*per* Caldwell, J.). Also *Graham v. Boston, etc. R. Co.*, 118 U. S. 169 (1886), (6 Sup. Ct. Rep. 1009); *Horne v. Railroad Co.*, 62 N. H. 454 (1883); *Providence Coal Co. v. Providence, etc. R. Co.*, 15 R. I. 303 (1886), (4 Atl. Rep. 394); *Burger v. Grand Rapids, etc. R. Co.*, 22 Fed. 561 (1884); *Horne v. Boston, etc. R. Co.* 18 Fed. 50 (1883).

³ *Graham v. Boston, etc. R. Co.*, 118 U. S. 161 (1886), (6 Sup. Ct. Rep. 1009). Compare *Aspinwall v. Ohio, etc. R. Co.*, 20 Ind. 492 (1863), (83 Am. Dec. 329).

⁴ *Racine, etc. R. Co. v. Farmers Loan, etc. Co.*, 49 Ill. 331 (1868), (95 Am. Dec. 595).

consolidated by legislative authority . . . although the consolidated company must, from the very nature of a corporation, be regarded as a distinct entity in each State, yet the objects of consolidation would be very liable to be defeated, unless the entire line should be placed under one board of directors. . . . When the consolidated lines are placed under a common board, with a common name and seal, such board will, naturally, act as if the consolidated lines made but one company, and when their contracts assume that form, the courts must, for the protection of the public, and to enforce good faith, hold, as we have done in this case, that the contract is to be construed as made by the corporation of each State in which the subject matter of the contract lies: *ut res magis valeat quam pereat.*"

§ 104. **Rights and Powers of Interstate Consolidated Corporation.** — An interstate consolidated corporation may exercise all the powers and privileges conferred upon it — expressly or by reference — in the acts authorizing the consolidation and, as a general rule, stands, in each State, in the position of its constituent corporation in that State.¹

An interstate consolidated corporation is a domestic corporation within a State and entitled to exercise the power of eminent domain granted by a State to its corporations.² It has been held, however, that an act authorizing the consolidation of a domestic railroad company with corporations of other States and granting the consolidated company "all the faculties, powers, authorities, privileges and franchises conferred upon it by any of said States," relates simply to the faculties necessary for the general objects of its business and does not affect the local law in regard to the method of obtaining title to the right of way.³

¹ Delaware R. R. Tax Cas., 18 Wall. (U. S.) 206 (1873).

² *Trester v. Missouri Pacific R. Co.*, 33 Neb. 171 (1891), (49 N. W. Rep. 1110).

The power of a railroad company to begin proceedings for the condemnation of lands within the State is not lost by its consolidation with another

railroad company into a new organization, so as to constitute a corporation subject to the laws of the same State as the original company. *Toledo, etc. R. Co. v. Dunlap*, 47 Mich. 456 (1882), (11 N. W. Rep. 271).

³ *Pittsburgh, etc. R. Co. v. Reich*, 101 Ill. 174 (1887): "It [the act] relates to the corporation itself, and is

An interstate consolidated corporation acquires in each State, among other rights and powers, the right therein of its constituent corporation to issue bonds secured by mortgage;¹ and may issue them to take up bonds previously issued by such constituent.²

§ 105. **Duties of Interstate Consolidated Corporation—Taxation.**—A corporation formed by the consolidation of corporations of different States stands, in relation to each State, as a separate domestic corporation, governed by the laws of that State with respect to its property and franchises therein and subject to taxation in conformity with the laws, and to the exercise of the police power, of such State.³ The property of each constituent corporation remains subject to taxation in the same manner as before the consolidation.⁴ Each State,

designed to make it a unit in each and all of the States in which its line is located, but it does not assume to affect the local law in regard to acquiring title to right of way."

¹ *Mead v. New York, etc. R. Co.*, 45 Conn. 221 (1877): "That these laws gave to the original New York, Housatonic and Northern Railroad Company full power and authority to mortgage its property and franchises in this State as well as in the State of New York, to secure the payment of such sum or sums of money borrowed as might be necessary for completing and finishing and operating its railroad, counsel for the plaintiffs in error admit. But they deny that the consolidated company had any such power. It has, however, been shown that the effect of the consolidation was to confer upon, and give to, the consolidated company in this State, all the rights, powers, privileges, exemptions, franchises and property possessed by the original New York, Housatonic and Northern Railroad Company in this State . . . and this, of course, included the power of borrowing money and mortgaging the property and franchises of a corporation in this State to secure its payment. The mortgage was, therefore, a valid security for the purposes for which it

was executed, and operated as a lien upon the franchises as well as upon the real and personal property which became vested in the consolidated corporation by the agreement and act of consolidation."

See also *Racine v. Farmers Loan, etc. Co.*, 49 Ill. 331 (1868), (95 Am. Dec. 595).

² *Mead v. New York, etc. R. Co.*, 45 Conn. 221 (1877).

³ *Ohio, etc. R. Co. v. People*, 123 Ill. 467 (1888), (14 N. E. Rep. 874).

A corporation formed by the consolidation of various foreign and domestic railroad companies is a domestic, not a foreign corporation, and, therefore, the provisions of a *New York* statute compelling transfer agents of foreign corporations to exhibit lists of their stockholders, have no application to it. *Sage v. Lake Shore, etc. R. Co.*, 70 N. Y. 220 (1877).

⁴ *Delaware R. R. Tax. Cas.*, 18 Wall. (U. S.) 206 (1873); *Philadelphia, etc. R. Co. v. Maryland*, 10 How. (U. S.) 377 (1850); *Ohio, etc. R. Co. v. Weber*, 96 Ill. 443 (1880); *Quincy R., etc. Co. v. Adams County*, 88 Ill. 615 (1878).

The general Michigan railroad law in permitting the consolidation of railroad companies within the State with others beyond its boundaries, contem-

participating in the creation of an interstate consolidated corporation, may legislate for such corporation just as it would for its original companies, if no consolidation had taken place. Corporations and stockholders from other States having availed themselves of the advantages of an interstate consolidation cannot repudiate the corresponding obligations.¹

An interstate consolidated corporation is "incorporated under the laws of this State" within the meaning of a statute taxing corporations so incorporated.²

A provision in an act authorizing the consolidation of corporations of different States, that the new consolidated company shall be entitled to all the rights, privileges and immunities which each and all of its constituents enjoyed under their respective charters in no respect changes the position of the consolidated company in any State, with reference to taxation, from that of the original corporation in such State.³

§ 106. **Citizenship of Interstate Consolidated Corporation.** — Upon principles already indicated, an interstate consolidated corporation is, for the purpose of determining the jurisdiction of the federal courts and for securing to the judicial tribunals of each State due control over corporations and corporate property therein, conclusively presumed to be a citizen of each State concurring in its creation. "It enjoys in each State all the powers and privileges the corporations there chartered had and must answer in the courts and is amenable

plates leaving the domestic company in its original position as to stock and loans and annexing to its capital and loans (for purposes of taxation) additions which are made proportional to the original amounts. *Lake Shore, etc. R. Co. v. People*, 46 Mich. 193 (1881), (9 N. W. Rep. 249).

¹ *Peik v. Chicago, etc. R. Co.*, 94 U. S. 177 (1876): "Upon these terms the consolidation was finally perfected, and the consolidated company now exists under the two jurisdictions, but subject to the same legislative control as to its business in Wisconsin as private

persons. The Illinois companies might have stayed out. But they chose to come in and must now abide the consequences. Thus, Wisconsin is permitted to legislate for the consolidated company in that State precisely the same as it would for its own original companies, if no consolidation had taken place."

² *Ohio, etc. R. Co. v. Weber*, 96 Ill. 443 (1880). Compare *People v. New York, etc. R. Co.*, 129 N. Y. 474 (1892), (29 N. E. Rep. 959).

³ *Delaware R. R. Tax. Cas.*, 18 Wall. (U. S.) 228 (1873). See *ante*, § 72: "*Exemptions from Taxation.*"

to the laws of each State, respectively, as a corporation of that State.”¹.

An interstate consolidated corporation, therefore, being a citizen of each of the States of its constituent companies, cannot, when sued in one of those States, claim the right of removal to the federal courts upon the ground that it is a citizen of another State.²

The true underlying principle seems to be that the consolidated corporation, by the concurrent legislation, is, itself, created a citizen of each State. In many decisions of unquestioned authority, however, it is reasoned that each constituent corporation retains its identity and citizenship and that it, in reality, is the corporation sued.³ The distinction is that between an association of different citizens and one person possessing different attributes of citizenship.

An interstate consolidated corporation, upon similar principles, may institute a suit in a federal court as a citizen of a

¹ *Fitzgerald v. Missouri Pacific R. Co.*, 45 Fed. 812 (1891). In *Railroad Co. v. Harris*, 12 Wall. (U. S.) 82 (1870), the Supreme Court said. “The jurisdictional effect of the existence of such a [consolidated] corporation as regards the federal courts, is the same as that of a co-partnership of individual citizens residing in different States.”

² *United States v. Nashua, etc. R. Corp. v. Boston, etc. R. Corp.*, 136 U. S. 382 (1890), (10 Sup. Ct. Rep. 1004); *Pennsylvania R. Co. v. St. Louis, etc. R. Co.*, 118 U. S. 290 (1886), (6 Sup. Ct. Rep. 1094), *affirming s. c. sub nom. St. Louis, etc. R. Co. v. Indianapolis, etc. R. Co.*, 9 Biss. (U. S.) 144 (1879); *Muller v. Dows*, 94 U. S. 444 (1876); *Railway Co. v. Whitton*, 13 Wall. (U. S.) 270 (1871); *Fitzgerald v. Missouri Pacific R. Co.*, 45 Fed. 812 (1891); *Paul v. Baltimore, etc. R. Co.*, 44 Fed. 513 (1890); *Central Trust Co. v. Rochester, etc. R. Co.*, 29 Fed. 609 (1886).

Georgia: *Angier v. East Tennessee etc. R. Co.*, 74 Ga. 634 (1885).

Illinois: *Racine, etc. R. Co. v. Farmers Loan, etc. Co.*, 49 Ill. 331 (1868).

Michigan: *Chicago, etc. R. Co. v. Auditor General*, 53 Mich. 92 (1884), (18 N. W. Rep. 586).

New Hampshire: *Horne v. Boston, etc. R. Co.*, 62 N. H. 454 (1883).

³ *Nashua, etc. R. Corp. v. Boston, etc. R. Corp.*, 136 U. S. 356 (1890), (10 Sup. Ct. Rep. 1004); *Pennsylvania R. Co. v. St. Louis, etc. R. Co.*, 118 U. S. 297 (1886), (6 Sup. Ct. Rep. 1094); *s. c. sub nom. St. Louis, etc. R. Co. v. Indianapolis, etc. R. Co.*, 9 Biss. (U. S.) 144 (1879).

Notwithstanding the consolidation of two railroad corporations of different States, each retains its identity as a corporation of the State in which it was originally created; and in a suit against the consolidated corporation brought in one of such States it cannot obtain a removal to the federal courts on the ground that it is a citizen of the other State, though the consolidation was had under the laws of the latter State. *Paul v. Baltimore, etc. R. Co.*, 44 Fed. 514 (1890).

State concurring in its creation.¹ Upon principle it would seem, however, that it could not maintain such a suit in a State also concurring in its creation.

§ 107. **Foreclosure of Mortgages after Interstate Consolidation. Jurisdiction.**—A State is not presumed to waive its jurisdiction. Such waiver must be clearly expressed. Upon these principles it has been held that an action cannot be maintained in one State to foreclose a mortgage, existing at the time of the consolidation, upon property of a constituent corporation situated in another State, which has never granted permission to maintain such action.²

A court of equity of one State, however, acting *in personam*, may entertain jurisdiction of a suit to foreclose a mortgage executed by an interstate consolidated corporation covering, as an entirety, property situated in several States; and may require the defendant to convey to a receiver the property outside its jurisdiction.³ In *Muller v. Dows*,⁴ Mr. Justice Strong said: "A vast number of railroads partly in one State and partly in an adjoining State, forming continuous lines, have been constructed by consolidated companies, and mortgaged as entireties. It would be safe to say that more than one hundred millions of dollars have been invested on the

¹ In *St. Louis, etc. R. Co. v. Indianapolis, etc. R. Co.*, 9 Biss. (U. S.) 144 (1879), (*affirmed sub nom. Pennsylvania R. Co. v. St. Louis, etc. R. Co.*, 118 U. S. 297 (1886), (6 Sup. Ct. Rep. 1094), Judge Drummond said: "If the defendant corporation, though consolidated with another of a different State, can be sued in the federal court in the State of its creation as a citizen thereof, why can it not sue as a citizen of the State which created it? I can see no difference in the principle. It seems to me that when the plaintiff comes into the federal court, if a corporation of another State, it is clothed with all the attributes of citizenship which the laws of that State confer, and the shareholders of that corporation must be conclusively regarded as citizens of the State which created the corporation precisely the same as if it were a defendant." Quoted

with approval by Mr. Justice Field in *Nashua, etc. R. Corp. v. Boston, etc. R. Corp.*, 136 U. S. 378 (1890), (10 Sup. Ct. Rep. 1004). The conclusion was reached in this case that one consolidating corporation, as a citizen of one State, might sue another consolidating corporation in a federal court, as a citizen of another State. Manifestly however, an interstate consolidated corporation—as an *entity*—cannot sue itself, although it possesses different attributes in different States.

² *Eaton, etc. R. Co. v. Hunt*, 20 Ind. 464 (1863); *Pittsburgh, etc. R. Co. v. Rothschild*, 4 Cent. Rep. 107 (1886).

³ *Muller v. Dows*, 94 U. S. 449 (1876); *Mead v. New York, etc. R. Co.*, 45 Conn. 199 (1877).

⁴ *Muller v. Dows*, 94 U. S. 449 (1876).

faith of such mortgages. In many cases these investments are sufficiently insecure at the best. But if the railroad, under legal process, can be sold only in fragments; if, as in this case, where the mortgage is upon the whole line, and includes the franchises of the corporation which made the mortgage, the decree of foreclosure and sale can reach only the part of the road which is within the State,—it is plain that the property must be comparatively worthless at the sale. A part of a railroad may be of little value when its ownership is severed from the ownership of another part. And the franchise of the company is not capable of division. In view of this, before we can set aside the decree which was made it ought to be made clearly to appear beyond the power of the court. Without reference to the English chancery decisions, where this objection to the decree would be quite untenable, we think the powers of courts of chancery in this country is sufficient to authorize such a decree as was here made. It is here undoubtedly a recognized doctrine that a court of equity sitting in a State and having jurisdiction of the person, may decree a conveyance by him of land in another State, and may enforce the decree by process against the defendant.”

PART II.

CORPORATE SALES.

ARTICLE I.

SALES OF CORPORATE PROPERTY AND FRANCHISES.

CHAPTER XI.

SALES OF CORPORATE PROPERTY.

I. Sales of Property of Private Corporations.

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- § 110. Sale of Entire Property of Prosperous Corporation by Majority Vote.
- § 111. Sale of Entire Property of Losing Corporation by Majority Vote.
- § 112. Sale of Entire Corporate Property by Directors.
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I. *Sales of Property of Private Corporations.*

§ 108. Power to purchase and sell generally. — It is an elementary principle of corporation law that a corporation, subject to the limitations of its charter and constitutional and statutory prohibitions, has inherent power to acquire and hold any property, real or personal, reasonably useful or convenient in carrying on the business for which it was organized.¹

The right to acquire property carries with it the corresponding power of disposition, subject likewise to any restrictions in the charter of the corporation and considerations of public policy.² As said by Mr. Justice Campbell, in *White*

¹ *Lathrop v. Commercial Bank*, 8 Dana (Ky.) 114 (1839), (33 Am. Dec. 481): "No doctrine of the common law is more clearly and undeniably established than that which concedes to corporations an inherent or resulting right to acquire and hold title to land by contract, except so far only as they may be restricted by the objects of their creation, or the limitations of their charters."

See also:

United States: *Blanchard Gun Stock, etc. Factory v. Warner*, 1 Blatch. 277 (1848), (Fed. Cas. No. 1521).

Massachusetts: *Old Colony R. Co. v. Evans*, 6 Gray, 38 (1856).

Michigan: *Thompson v. Waters*, 25 Mich. 227 (1872).

New Jersey: *Freeman v. Sea View Hotel Co.*, 57 N. J. Eq. 68 (1898).

New York: *Nicoll v. New York, etc. R. Co.*, 12 N. Y. 121 (1854); *Moss v. Averell*, 10 N. Y. 449 (1853); *Spear v. Crawford*, 14 Wend. 23 (1835).

North Carolina: *Mallett v. Simpson*, 94 N. C. 37 (1886), (55 Am. Rep. 594).

Vermont: *Page v. Heineberg*, 40 Vt. 81 (1868).

² *United States*: *Jones v. Guaranty, etc. Co.*, 101 U. S. 625 (1879): "At the common law, every corporation had, as incident to its existence, the power to acquire, hold, and convey real estate, except so far as it was restrained by its charter or by act of Parliament. This comprehensive capacity included also personal effects of every kind." Also *White Water, etc. Co. v. Valette*, 21 How. 424 (1858).

Alabama: *Hall v. Tanner, etc. Engine Co.*, 91 Ala. 363 (1890), (8 So. Rep. 348).

California: *Miner's Ditch Co. v. Zellerbach*, 37 Cal. 543 (1869); *People v. California College*, 38 Cal. 166 (1869).

Iowa: *Buell v. Buckingham*, 16 Iowa, 284 (1864), (85 Am. Dec. 516).

Maryland: *Binney's Case*, 2 Bland. 142 (1840).

Michigan: *Joy v. Jackson, etc. Plank Road Co.*, 11 Mich. 165 (1863).

New Hampshire: *Pierce v. Emery*, 32 N. H. 484 (1856).

New York: *Barry v. Merchants Exch. Co.*, 1 Sandf. Ch. 280 (1844).

North Carolina: *Benbow v. Cook*, 115 N. C. 324 (1894), (20 S. E. Rep. 453, 44 Am. St. Rep. 454).

Water, etc. Co. v. Valette:¹ "It is well settled that a corporation, without special authority, may dispose of lands, goods and chattels, or any interest in the same." A private corporation, therefore, by proper corporate action — generally by its directors and always by vote of a majority of its stockholders — may sell any portion of its property not sufficient to constitute an abandonment of its business.

§ 109. **Sale of Entire Corporate Property by Unanimous Consent.** — A corporation which, in consideration of the grant of franchises, has assumed the performance of public duties — a *quasi*-public corporation — cannot dispose of all its property and disable itself from fulfilling its obligations without the consent of the State — the other party to the contract. It is immaterial that all the stockholders approve of the sale.

A private corporation, on the other hand, with the unanimous consent of its stockholders, may sell and dispose of its entire property without other restriction or qualification than that the purpose must be lawful and free from fraud — actual or constructive.² It may make such terms as it may deem expedient, and, if *intra vires*, may accept stock in other corporations in payment for property sold.³

Ohio: *Reynolds v. Stark County Comm'rs*, 5 Ohio, 204 (1831).

Pennsylvania: *Ardesco Oil Co. v. North American Oil, etc. Co.*, 66 Pa. St. 382 (1870); *Dana v. Bank of United States*, 5 W. & G. 243 (1843).

England: *Mayor, etc. of Colchester v. Lawton*, 1 V. & B. 244 (1813).

¹ *White Water, etc. Co. v. Valette*, 21 How. (U. S.) 424 (1858).

² *Holmes, etc. Mfg. Co. v. Holmes, etc. Metal Co.*, 127 N. Y. 252 (1891), (27 N. E. Rep. 841), (*per* Haight, J.): "The plaintiff was a private manufacturing corporation. It exercises no power of a public nature and has attempted no combination by which the public may in any manner be prejudiced. There are consequently no questions of public policy to be considered. . . . The plaintiff had the right, with the consent of its stockholders, to sell its plant and

retire from business; and it appears from the evidence in this case that the consent of all the stockholders was given to the sale that was made."

Leathers v. Janney, 41 La. Ann. 1123 (1889), (6 So. Rep. 884, 6 L. R. A. 661): [It is maintained] "that the sale was the whole property of the selling corporation and was, therefore, *ultra vires* and void. The inference does not follow from the predicate. There is no law prohibiting a corporation from selling all or any of its property provided its charter contains no restraint thereof and it acts under proper authority."

See also *Jordan v. Collins*, 107 Ala. 572 (1894), (18 So. Rep. 137); *State v. Western Irrigating Canal Co.*, 40 Kan. 96 (1888), (19 Pac. Rep. 349).

³ *Kohl v. Lilienthal*, 81 Cal. 378 (1889), (20 Pac. Rep. 401). See also *post*, §§ 118-122.

§ 110. **Sale of Entire Property of Prosperous Corporation by Majority Vote.** — The implied contract — the contract of association — between stockholders in forming a corporation is that a majority shall bind the whole body as to all transactions within the scope of the corporate powers. The authority carries with it a corresponding obligation. The powers of a corporation must be exercised in furtherance of the objects for which it was created and with due regard to the rights of minority stockholders.¹

A majority of the stockholders of a prosperous corporation have no authority to sell its entire property in order to engage in a new enterprise, for purposes of speculation or when no reasons of expediency require the sale.² But when, in the

¹ *Ervin v. Oregon R., etc. Co.*, 27 Fed. 631 (1886), (Wallace, J.): "It cannot be denied that minority stockholders are bound hand and foot to the majority in all matters of legitimate administration of the corporate affairs; and the courts are powerless to redress many forms of oppression practised upon the minority under the guise of legal sanction which fall short of actual fraud. This is a consequence of the implied contract of association, by which it is agreed in advance that a majority shall bind the whole body as to all matters within the scope of the corporate powers. But it is also of the essence of the contract that the corporate powers shall only be exercised to accomplish the objects for which they were called into existence, and that the majority shall not control those powers to prevent or destroy the original purposes of the corporators."

Taylor v. Chicester, etc. R. Co., L. R. 2 Exch. 379 (1867), (Blackburn, J.): "As the shareholders are, in substance, partners in a trading corporation, the management of which is intrusted to the body corporate, a trust is, by implication, created in favor of the shareholders that the corporation will manage the corporate affairs, and apply the corporate funds, for the purpose carrying out the original speculation."

² *Price v. Holcomb*, 89 Iowa, 135 (1893), (56 N. W. Rep. 407): "It is unquestionably true that a private corporation holds its property as a trust fund for the stockholders and that, when a majority of the stockholders act together, they are in a sense the corporation and must act with due regard to the right of the minority. If the majority decide arbitrarily, and without just cause, to sell the property of the corporation to the prejudice of the minority, and thereby compel the winding up of the business of the corporation, it is a fraud upon the minority and courts of equity will interfere. If, however, just cause exists for selling the property, as when the corporation is insolvent, and the sale is necessary to pay debts, or when, from any cause, the business is a failure and an unprofitable one, and the best interests of all require it, the majority have clearly power to order the sale, and in such case their acts are not *ultra vires*." The conclusion reached in this case that the courts may determine whether "just cause" exists for winding up the affairs of a corporation is opposed to sound principle. They may properly determine whether fraud or oppression towards the minority exists, but the inquiry cannot go further without encroaching upon the rights of the majority.

opinion of a majority, the interests of the stockholders as a whole require that the affairs of a corporation should be wound up, a majority may authorize the sale of the entire assets of a corporation, for a pecuniary consideration, as a *step towards liquidation*.¹

The rule that a majority cannot sell the entire corporate assets has been stated very broadly by courts of high authority. Thus in *Bryne v. Schayler Electric Mfg. Co.*, 65 Conn. 351 (1895), (31 Atl. Rep. 833), the Supreme Court of Errors of Connecticut said: "It results that neither the directors nor a majority of the stockholders can sell the corporate property against the dissent of any stockholder. This is entirely clear in case of a solvent corporation." And in *People v. Ballard*, 134 N. Y. 294 (1892), (32 N. E. Rep. 84), the New York Court of Appeals said: "While a corporation may sell its property to pay its debts or to carry on its business, it cannot sell its property in order to deprive itself of existence."

An examination of these cases, however, clearly indicates that the courts merely intended to state the general rule that a majority cannot sell the entire corporate assets of a solvent corporation and did not intend to negative the exception stated in the text that, for the *bona fide* purpose of winding up the affairs of the corporation, such power exists. In the New York cases the sales were to foreign corporations for the purpose of escaping State control over domestic companies.

¹ *United States*: *Hayden v. Official Red Book and Directory Co.*, 42 Fed. 876 (1890): "The right of the majority stockholders of a corporation established for manufacturing or trading purposes to wind up its affairs, and dispose of its assets, even against the objections of the minority stockholders, whenever it appears that the business can be no longer advantageously carried on, is well recognized."

Alabama: *Elyton Land Co. v. Dow-*

dell, 113 Ala. 186 (1896), (20 So. Rep. 981), *semble*.

Louisiana: *Pringle v. Eltringham Construction Co.*, 49 La. Ann. 303 (1897), (21 So. Rep. 515).

Maine: *Inhabitants of Waldo-borough v. Knox, etc. R. Co.*, 84 Me. 469 (1892), (24 Atl. Rep. 942).

Massachusetts: In *Treadwell v. Salisbury Mfg. Co.*, 7 Gray, 404 (1856), Judge Bigelow said: "At common law, the right of corporations, acting by a majority of their stockholders, to sell their property is absolute, and is not limited as to objects, circumstances or quantity. . . . To this general rule there are many exceptions, arising from the nature of particular corporations, the purposes for which they were created, and the duties and liabilities imposed on them by their charters. Corporations established for objects *quasi-public*, such as railway, canal and turnpike corporations, to which the right of eminent domain and other large privileges are granted in order to enable them to accommodate the public, may fall within the exception; as also charitable and religious bodies, in the administration of whose affairs the community or some portion of it has an interest to see that their corporate duties are properly discharged. Such corporations may, perhaps, be restrained from alienating their property, and compelled to appropriate it to specific uses, by mandamus or other proper process. But it is not so with corporations of a private character, established solely for trading and manufacturing purposes. Neither the public nor the legislature have any direct interest in their business or its management. These were committed solely to the stockholders, who have a pecuniary stake in the proper conduct

In *Pringle v. Eltringham Construction Co.*¹ Judge McEnery said: "It is a fundamental principle that, in a corporation organized for the exclusive benefit of the corporators or shareholders, the majority of its members may, in their discretion, wind up its business whenever they deem this step to be in the interests of the whole association. The majority may, without the consent of the minority, sell the whole of the company's property, close up its business and distribute its assets, provided this is done in good faith and not for the purpose of speculation and the intention of starting the company's business anew at a subsequent time."

The power to sell the entire corporate assets follows, therefore, as an incident to the power to wind up the affairs of the corporation. Corporate action towards dissolution is essentially within the powers of a corporation and, consequently, may be exercised by a majority of the stockholders.²

It has been urged that this power of a majority to wind up a corporation, and to dispose of its assets for such purpose, exists only in the case of failing concerns.³ The distinction

of their affairs. By accepting a charter, they do not undertake to carry on the business for which they are incorporated, indefinitely, and without any regard to the condition of their corporate property. Public policy does not require them to go on at a loss. On the contrary, it would seem very clearly for the public welfare, as well as for the interest of the stockholders, that they should cease to transact business as soon as, in the exercise of a sound judgment, it is found that it cannot be prudently continued."

Rhode Island: *Peabody v. Westerly Water Works*, 20 R. I. 176 (1897), (37 Atl. Rep. 807).

¹ *Pringle v. Eltringham Construction Co.*, 49 La. Ann. 303 (1897), (21 So. Rep. 515), citing 1 Morawetz on Priv. Corp. § 413.

² *United States*: *Hayden v. Official Red Book, etc. Co.*, 42 Fed. 876 (1890). Compare *Ervin v. Oregon R., etc. Co.*, 27 Fed. 625 (1886).

Alabama: *Merchants, etc. Line v. Waganer*, 71 Ala. 581 (1882).

Louisiana: *Pringle v. Eltringham, etc. Co.*, 49 La. Ann. 301 (1897), (21 So. Rep. 515); *Trisconi v. Winship*, 43 La. Ann. 45 (1891), (9 So. Rep. 29).

Massachusetts: *Treadwell v. Salisbury Mfg. Co.*, 7 Gray, 393 (1856), (66 Am. Dec. 490).

New Jersey: *Black v. Delaware, etc. Canal Co.*, 22 N. J. Eq. 415 (1871).

Pennsylvania: *McCurdy v. Myers*, 44 Pa. St. 535 (1863); *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 42 (1858).

Rhode Island: *Wilson v. Central Bridge Co.*, 9 R. I. 590 (1870). Compare, however, *Boston, etc. R. Co. v. New York, etc. R. Co.*, 13 R. I. 260 (1881).

³ *Kean v. Johnson*, 9 N. J. Eq. 401 (1853), *dictum* of Parker, Master. See also *Price v. Holcomb*, 89 Iowa, 135 (1893), (56 N. W. Rep. 407), 2 Cook on Corp. § 670.

is not well drawn. Where no time is fixed for its duration in the charter of a corporation or in some general or special law¹ there is no contract between the stockholders that it shall go on forever or until it becomes embarrassed. The very best time to wind up the affairs of a corporation may be—in view of future uncertainties—when it is most prosperous and has accumulated a large surplus. The determination of the question when this action should be taken, must rest in the discretion of the majority. If unanimous consent were necessary a single stockholder might prevent action and thus, negatively, control the corporation.

The courts cannot pass upon the question whether a corporation should be wound up, further than to determine whether the majority act in good faith and without oppression towards the minority. Questions of expediency in corporate management cannot properly be brought before the courts for review.²

§ 111. **Sale of Entire Property of Losing Corporation by Majority Vote.**—The general rule that a majority cannot sell the entire assets of a prosperous corporation is based upon the principle that a majority cannot control corporate powers to defeat corporate purposes. It is subject to the exception— noted in the last section—that such sale may be made as a step towards dissolution.

The power of a majority to dispose of all the property of a *losing* corporation, however, is in furtherance of the purposes of the corporation and arises *ex necessitate*.

When the further prosecution of the business of the corporation would be unprofitable, it is the duty, as well as the

¹ When the term of existence of a corporation is of fixed duration, the implied contract of the stockholders refers to such period, and the dissolution of a prosperous corporation before its expiration would require unanimous action. *Barton v. Enterprise, etc. Ass'n*, 114 Ind. 226 (1887), (16 N. E. Rep. 486). Compare *Black v. Delaware, etc. Canal Co.*, 22 N. J. Eq. 130 (1871); *Zabriskie v. Hackensack, etc. R. Co.*,

18 N. J. Eq. 178 (1867), (90 Am. Dec. 617); *Kean v. Johnson*, 9 N. J. Eq., (1853).

Where a corporation, even with such a charter, is in a failing condition, however, the majority are justified in acting *ex necessitate*.

² Compare, however, *Price v. Holcomb*, 89 Iowa, 135 (1893), (56 N. W. Rep. 407).

right, of the majority to dispose of its property and take action towards the liquidation of its affairs.¹

§ 112. **Sale of Entire Corporate Property by Directors.**—The directors of a corporation are appointed to manage its affairs. They have implied authority to acquire and dispose of its property in the usual course of business. They have no right to take any action which will thwart the purpose for which the corporation was created.

The powers of directors are defined by the charter and by-laws of the corporation. The extraordinary power of disposing of the entire corporate assets *might* be conferred upon them.² But, unless expressly conferred, the directors of a prosperous corporation have no power to sell out its entire property and deprive it of the means of continuing business. And the directors of a losing, but not insolvent, corporation are equally without implied authority to wind up its affairs and dispose of its assets.³

¹ *United States*: *Hayden v. Official Hotel Red Book, etc. Co.*, 42 Fed. 875 (1890); *Hancock v. Holbrook*, 9 Fed. 353 (1881). *Compare* *Hunt v. American Grocery Co.*, 81 Fed. 532 (1897).

Iowa: *Price v. Holcomb*, 89 Iowa, 123 (1893), (56 N. W. Rep. 407). *Compare* *Buell v. Buckingham*, 16 Iowa, 284 (1864).

Louisiana: *Hancock v. Holbrook*, 40 La. Ann. 53 (1888), (3 So. Rep. 351).

Massachusetts: *Treadwell v. Salisbury Mfg. Co.*, 7 Gray, 393, 404 (1856); *Sargent v. Webster*, 13 Met. 497 (1847).

Mississippi: *Berry v. Broach*, 65 Miss. 453 (1888), (4 So. Rep. 117).

New Jersey: *Sewell v. East Cape May Beach Co.*, 50 N. J. Eq. 717 (1892), (25 Atl. Rep. 929).

New York: *Skinner v. Smith*, 134 N. Y. 240 (1892), (31 N. E. Rep. 911). *Quære* *People v. Ballard*, 136 N. Y. 639 (1892), (32 N. E. Rep. 611), (motion for reargument of s. c. 134 N. Y. 269 (1892), (32 N. E. Rep. 54)).

² *Mahaska County R. Co. v. Des Moines Valley R. Co.*, 28 Iowa, 451 (1870): "It will be remembered that the sixth section of the articles of incorpo-

ration expressly gives the right to the directors with the assent of [a majority in interest of] the stockholders, to sell or transfer the estate or franchises of the company where, in the opinion of the directors, such sale or transfer would either facilitate the construction of the road or promote the interests of the company. Then, too, the directors, without reference to the interest of the stockholders, were given power to connect the road with any other road, and to make contracts in relation to such joint or separate ownership, use or occupation. And hence it is clear that the charter conferred the power to make such transfer, even though it covered the entire estate of the company—the same being made with the consent of the stockholders as therein contemplated. And certainly there is no rule of law which prevents those constituting a corporation (having reference of course at all times to the rights of third persons) from making such absolute sale or transfer, though it should occur thereby that the object contemplated should be entirely defeated."

³ In the leading case of *Abbott v.*

The distinction between a losing corporation able to pay its debts and an insolvent corporation must be observed. The transfer of the entire property of the one involves primarily the relations between a corporation and its stockholders; of the other, the relations between a corporation and its creditors. As said by Judge Peckham in *Vanderpoel v. Gorman*:¹ "The assignment of property by an insolvent corporation to pay its debts is a very different action from so disposing of its property when solvent, as to make its continued exercise of its franchises impossible."

In the absence of a controlling statute or by-law of the corporation, the directors have power to authorize an assignment of the property of an insolvent corporation for the benefit of its creditors.²

American Hard Rubber Co., 33 Barh. (N. Y.) 578 (1861), a majority of the trustees of a business corporation, transferred all its personal property, which was especially adapted to its business, to two persons, who forthwith caused another corporation to be formed, and transferred such property to it. It was held, that as such transfer practically terminated the corporation by taking from it the power to fulfil the object of its organization, it was a violation of that object, was not within the power of the trustees, and was *ultra vires* and void.

Compare *Wolf v. Arminius Copper Mine Co.*, 6 Misc. (N. Y.) 562 (27 N. Y. Supp. 642) (1894), distinguishing *Abbott v. American Hard Rubber Co.*, *supra*.

For other cases holding that the directors of a corporation have no implied authority to dispose of its property so as to prevent it from carrying on the business for which it was created, see:

Missouri: *Feld v. Roanoke Investment Co.*, 123 Mo. 613 (1894), (27 S. W. Rep. 635): "The officers of a corporation cannot, against the wishes of its stockholders or any one of them, sell and transfer the entire property from which it derives its emoluments or which

forms the basis of its business operations. To do so would be to commit a breach, if not of the express terms of the contract, of its implied terms, by which the general objects defined in its charter would be diverted and, in effect, destroyed."

New York: *People v. Ballard*, 134 N. Y. 269 (1892), (32 N. E. Rep. 54); *Blatchford v. Ross*, 54 Barh. 42 (1869); *Metropolitan El. R. Co. v. Manhattan R. Co.*, 14 Abb. N. C. 103 (1884); *Smith v. New York Consolidated Stage Co.*, 18 Abb. Pr. 419 (1864).

Pennsylvania: *Carter v. Producers Oil Co.*, 164 Pa. St. 463 (1894), (30 Atl. Rep. 391); *Balliet v. Brown*, 103 Pa. St. 554 (1883).

Tennessee: *Deaderick v. Wilson*, 8 Baxt. 108 (1874).

¹ *Vanderpoel v. Gorman*, 140 N. Y. 563 (1894), (35 N. E. Rep. 932).

² *Vanderpoel v. Gorman*, 140 N. Y. 563 (1894), (35 N. E. Rep. 932): "The corporation had the power to make an assignment. It was a corporate act and neither the statute nor any by-law provided that it should be otherwise done than by the president and secretary and treasurer, under the authority of the board of directors. This sufficiently appears to have been so done and that is enough."

§ 113. **Ratification by Stockholders of Sale by Directors.** — While directors have no implied authority to sell the entire assets of a corporation, a sale made by them may be validated by the subsequent ratification of the stockholders.¹

Ratification and authorization are governed by the same principles. A sale of corporate property which, in the first instance, requires unanimous consent, can only be made good by the approval of all the stockholders. A sale requiring the vote of a majority may be ratified by a majority.

See also *De Camp v. Alward*, 52 Ind. 468 (1876); *Sargent v. Webster*, 13 Metc. (Mass.) 497 (1847); *Dana v. Bank of United States*, 5 W. & S. 223 (1843); *Boynton v. Roe*, 114 Mich. 401 (1897), (72 N. W. Rep. 257); *Tripp v. North Western Nat. Bank*, 41 Minn. 400 (1889), (43 N. W. Rep. 60, s. c. 45 Minn. 383 (1891), (48 N. W. Rep. 4); *Wright v. Lee*, 2 S. D. 596 (1892), (57 N. W. Rep. 706); *Birmingham, etc. Co. v. Freeman*, 15 Tex. Civ. App. Rep. 451 (1897), (39 S. W. Rep. 626). Most of these decisions are based upon State insolvency statutes.

¹ In *Sheldon, etc. Co. v. Eickemeyer, etc. Co.*, 90 N. Y. 613 (1882), the Court of Appeals said: "In transferring the property of the corporation to pay its debts the trustees believed that they were acting within the scope of their authority, and the defendant accepted the transfer and received the property in satisfaction of its claim against the plaintiff, in the honest belief that it acquired good title thereto. If the trustees had no power, as the agents of the corporation, to transfer all its property, thus depriving it of the means of carrying on the business for which it was organized, it is but the case of an agent making a contract in excess of his authority. The act is voidable, not void. The principal may, nevertheless, affirm the act, and a ratification is equivalent to a prior authorization. If all the stockholders of this corporation had, with full knowledge, subsequently ratified the transfer and affirmed the settle-

ment, the act — though beyond the powers given the trustees by the charter — could not be subsequently avoided by the stockholders, or by the corporation."

The conveyance under the authority of the directors, whose action is ratified subsequently by a majority of the stockholders, of the total assets of a private corporation in payment of its debts, operates as a valid conveyance of the property, as against other stockholders, in the absence of fraud, and when a longer continuance of the business would be prejudicial to all parties. *Hancock v. Holbrook*, 9 Fed. 353 (1881).

See also *Hancock v. Holbrook*, 40 La. Ann. 53 (1888), (3 So. Rep. 351); *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159 (1879).

Where the directors of a mercantile corporation called a stockholders' meeting to consider the propriety of a sale of its business, at which less than one-third of the stock was represented, but a resolution was adopted instructing the directors to dispose of the business upon such terms as they should deem best, it was held that as the statutes fully provided for winding up the corporation in case its business was unprofitable, or in case it was obliged to suspend for want of funds, the directors should be enjoined, at the suit of a stockholder, from disposing of the assets, so as to prevent the corporation from carrying out the objects of its incorporation. *Hunt v. American Grocery Co.*, 81 Fed. 532 (1897).

The approval by the stockholders of a sale made by the directors may also be inferred from their failure to object within a reasonable time.¹ In *Stokes v. Detrick*² the Supreme Court of Maryland said: "While it is well settled that the directors of a corporation cannot, ordinarily, alone sell and convey the whole of its property, yet it is equally true that, if such an unauthorized transfer is made, it may be ratified by the assent of the stockholders, and such assent may be inferred from their failure to protest against and promptly condemn the unauthorized acts of the officers of the corporation."

§ 114. Remedies of Dissenting Stockholders in Case of Invalid or Unfair Sales. — A sale of the entire property of a prosperous corporation for purposes other than the winding up of its affairs, or an exchange of corporate assets for property entailing outside obligations, requires, for reasons elsewhere indicated, the unanimous consent of the stockholders.³ Any such sale or exchange is *ultra vires* the majority and an infringement upon the rights of minority stockholders.

A dissenting stockholder has a right to stand upon the contract of association as made, and equity will afford him a remedy — preventive or annulling — against any acts of the majority beyond their powers.⁴ It is entirely immaterial that

¹ *Balliet v. Brown*, 103 Pa. St. 554 (1883); *Stokes v. Detrick*, 75 Md. 256 (1892), (23 Atl. Rep. 846).

² *Stokes v. Detrick*, 75 Md. 263 (1892), (23 Atl. Rep. 846).

³ See ante, § 109: "*Sale of Entire Corporate Property by Unanimous Consent*;" ante, § 110: "*Sale of Entire Property of Prosperous Corporation by Majority Vote*;" post, § 118: "*Transfer of Entire Corporate Property without Unanimous Consent requires Monetary Consideration*."

⁴ *United States v. Mason v. Pewabic Mining Co.*, 133 U. S. 50 (1890), (10 Sup. Ct. Rep. 224); *Mackintosh v. Flint, etc. R. Co.*, 34 Fed. 582 (1888). In *Dodge v. Woolsey*, 18 How. (U. S.), 331 (1855), Justice Wayne clearly states the general principles governing the application of preventive remedies by

injunction, at the instance of stockholders, to restrain those administering the affairs of a corporation from doing acts amounting to a violation of its charter or from monopolizing its funds. And in the later leading case of *Hawes v. Oakland*, 104 U. S. 450 (1881), Justice Miller formally states the rules governing the grant of equitable relief to stockholders of corporations.

Connecticut: *Byrne v. Schnyler Electric Mfg. Co.*, 65 Conn. 336 (1895), (31 Atl. Rep. 833).

Georgia: *Central R., etc. Co. v. Collins*, 40 Ga. 582 (1869).

New York: *Abbott v. American Hard Rubber Co.*, 33 Barb. 578 (1861).

Pennsylvania: *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 42 (1858).

Rhode Island: *Boston, etc. R. Co.*

a proposed purchase or sale may, in the opinion of the court, be advantageous to such stockholder.¹ He alone can determine that. So his motive in bringing suit is of no importance.²

Upon similar principles, where a majority of the stockholders of a corporation have power to dispose of its entire assets, they must act with fairness towards minority stockholders. A sale wherein the majority obtain, directly or indirectly, more favorable terms than the minority may be avoided by the latter, or the majority may be compelled to account.³ So where a majority sell the corporate assets to another corpora-

v. New York, etc. R. Co., 13 R. I. 260 (1881).

England: *Beman v. Rufford*, 1 Sim. (N. S.) 550 (1851); *Ware v. Grand Junction Water Co.*, 2 Russ. & Myl. 470 (1831); *Bagshaw v. Eastern Union R. Co.*, 7 Hare, 114 (1849).

Compare *Treadwell v. Salisbury Mfg. Co.*, 7 Gray (Mass.), 393 (1856), (66 Am. Dec. 490); *Hodges v. New England Screw Co.*, 1 R. I. 312 (1850), (53 Am. Dec. 624); *Dudley v. Kentucky High School*, 9 Bush (Ky), 576 (1873).

¹ *Central R., etc. Co. v. Collins*, 40 Ga. 617 (1869): "We do not think the profitableness of this contract, to the stockholders of the Central Railroad Co., . . . has anything to do with the matter. These stockholders have the right, at their pleasure, to stand on their contract. If the charters do not give to these companies the right to go into this new enterprise, any one stockholder has the right to object. He is not to be forced into an enterprise not included in the charter. That it will be to his interest is no excuse; that is for him to judge."

See also *Byrne v. Schuyler Electric Mfg. Co.*, 65 Conn. 336 (1895), (31 Atl. Rep. 833); *Stevens v. Rutland, etc. R. Co.*, 29 Vt. 545 (1851); *Beman v. Rufford*, 1 Sim. (N. S.) 550 (1851).

² *Central R., etc. Co. v. Collins*, 40 Ga. 582 (1869); *Carson v. Iowa, etc. Co.*, 80 Iowa, 638 (1890), (45 N. W. Rep. 1068); *Elkins v. Camden, etc. R. Co.*, 36 N. J. Eq. 5 (1882); *Ramsey v.*

Gould, 57 Barb. (N. Y.), 398 (1870); *Pender v. Lushington*, L. R. 6 Ch. 70 (1877).

³ In *Ervin v. Oregon R., etc. Co.*, 27 Fed. 625 (1886), where a majority of the stockholders of a corporation merged its business and property with businesses and properties belonging to themselves and embarked the whole in a joint venture, Judge Wallace said (p. 632): "Applying these principles to the case in hand, although the minority of stockholders cannot complain merely because the majority have dissolved the corporation and sold its property, they may justly complain because the majority, while occupying a fiduciary relation towards the minority, have exercised their powers in a way to buy the property for themselves, and exclude the minority from a fair participation in the fruits of the sale. In the language of Mellish, L. J., in *Menier v. Hooper's Telegraph Works*, L. R. 9 Ch. App. 354 (1874): 'The majority cannot sell the assets of the company, and keep the consideration, but must allow the minority to have their share of any consideration which may come to them.'"

For other somewhat similar cases where the courts have protected the interests of minority stockholders see *Buckley v. Big Muddy Iron Co.*, 7 Mo. App. 589 (1879); *Fougeray v. Cord*, 50 N. J. Eq. 185 (1899), (24 Atl. Rep. 499). See also *Hayden v. Official Red Book etc. Co.*, 42 Fed. 875 (1890).

tion, owned by themselves, in violation of the rights of the minority, the latter have an equitable lien upon the property sold to the extent of their interests.¹

§ 115. **Procedure in Stockholders' Actions.** — All the minority stockholders may join in a suit to enjoin the execution of a contract of sale, proposed by the majority and requiring unanimous consent — or for its cancellation if executed; or any less number of such stockholders may maintain the suit. In the latter case, in order to prevent a multiplicity of suits and that all parties interested shall, theoretically, be before the court, it is necessary that the stockholder — in case an individual stockholder acts — should institute the suit in behalf of himself and of other stockholders similarly situated.²

All the actors, in transactions by which the rights of minority stockholders have been infringed, are proper parties defendant to suits at their instance.³

While a rule of the federal courts, established to prevent collusive transfers of stock merely for the purpose of conferring jurisdiction, requires that a plaintiff stockholder should have been such at the time when the transaction complained of took place,⁴ the prevailing rule in England and this country

¹ *Ervin v. Oregon R., etc. Co.*, 27 Fed. 625 (1886).

² *United States: Zabriskie v. Cleveland, etc. R. Co.*, 23 How. 395 (1859).

Illinois: Whitney v. Mayo, 15 Ill. 251 (1853).

Massachusetts: Peabody v. Flint, 6 Allen, 52 (1863).

New Hampshire: March v. Eastern R. Co., 40 N. H. 548 (1860).

New York: Blatchford v. Ross, 54 Barb. 42 (1869).

Vermont: Stevens v. Rutland, etc. R. Co., 29 Vt. 545 (1851).

England: Clinch v. Financial Corp., L. R. 4 Ch. App. 117 (1868); *Taylor v. Salmon*, 4 Myl. & C. 134 (1838); *Mozley v. Alston*, 1 Phill. 790 (1847); *Beman v. Rufford*, 1 Sim. (n. s.) 550 (1851); *Winch v. Birkenhead, etc. R. Co.*, 5 De G. & S., 562 (1852).

Compare, however, *Hoole v. Great*

Western R. Co., L. R. 3 Ch. App. 262 (1867).

³ *Ervin v. Oregon R., etc. Co.*, 27 Fed. 625 (1886).

⁴ Supreme Court equity rule 94 is as follows: "Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance."

For cases in the federal courts construing the rule see *Lafayette Co. v.*

is that a transferee, taking his stock since that time, may sue.¹

The general rule of equity that a stockholder must first seek relief within his corporation, manifestly has no application when the minority seek relief from the wrongful acts of the majority. The majority will hardly attack sales which they, themselves, have made or authorized. Under such circumstances, demand that the corporation take action is unnecessary before bringing suit.²

§ 116. **Defences to Stockholders' Actions. Estoppel.**—Sales of corporate property, for an unlawful purpose, are *ultra vires* of the corporation. Sales of corporate property, for a purpose requiring unanimous consent, are *ultra vires* of the majority. Principles of estoppel may make good the latter but not the former.³

Neely, 21 Fed. 738 (1884); *Evans v. Union Pacific R. Co.*, 58 Fed. 497 (1893); *Symmes v. Union Trust Co.*, 60 Fed. 830 (1894).

¹ *Winsor v. Bailey*, 55 N. H. 218 (1875); *Ervin v. Oregon R., etc. Co.*, 35 Hun (N. Y.), 544 (1885), s. c. 28 Hun, 269 (1882); *Chicago v. Cameron*, 22 Ill. App. 91 (1886); *Seaton v. Grant*, L. R. 2 Ch. App. 459 (1867).

In Georgia the rule of the federal courts has been adopted. *Alexander v. Searcy*, 81 Ga. 536 (1889), (8 S. E. Rep. 630, 12 Am. St. Rep. 337). See also *Moore v. Mining Co.*, 104 N. C. 534 (1889), (10 S. E. Rep. 679).

In *Hollins v. St. Paul, etc. R. Co.*, 29 N. Y. St. Rep. 208 (1889), (9 N. Y. Supp. 909), it was held that a stockholder could not object to a transfer of corporate property for stock in another corporation, decided upon before he bought his stock; that he stood in the shoes of those from whom he had bought.

In *Bloxham v. Metropolitan R. Co.*, L. R. 3 Ch. App. 337 (1868), it was held to be immaterial that the stock was purchased for the purpose of bringing suit.

² *Davis v. Gemmell*, 70 Md. 376,

(1889), (17 Atl. Rep. 259); *Chicago Hansom Cab Co. v. Yerkes*, 141 Ill. 320 (1892), (30 N. E. Rep. 667); *Nathan v. Tompkins*, 82 Ala. 437 (1887), (2 So. Rep. 747).

³ In *Kent v. Quicksilver Mining Co.*, (78 N. Y. 185) (1879), Judge Folger said: "When it is a question of the right of a stockholder to restrain the corporate body within its express or incidental powers, the stockholder may in many cases be denied, on the ground of his express assent or his intelligent though tacit consent to the corporate action. If there be a departure from statutory direction, which is to be considered merely a breach of trust to be restrained by a stockholder, it is pertinent to consider what has been his conduct in regard thereto. A corporation may do acts which affect the public to its harm, inasmuch as they are *per se* illegal or are *malum prohibitum*. Then no assent of stockholders can validate them. It may do acts not thus illegal, though there is a want of power to do them, which affect only the interests of the stockholders. They may be made good by the assent of the stockholders, so that strangers to the stockholders, dealing in good faith with the corpora-

Where the want of a stockholder's assent affects the validity of a sale, he may be estopped from setting it up. By participating in the transfer of corporate property,¹ or by acquiescing and failing for an unreasonable time to take steps to set it aside,² a stockholder may be estopped from taking action. "Acquiescence is an implied sanction of the sale,"³ and, as a defence, is essentially the same as laches, although the former carries the idea of tacit approval and the latter of neglect or delay.

The defence of estoppel involves both knowledge and unreasonable delay on the part of the stockholder who brings the suit,⁴ or the prior holder of his shares,⁵ although the

tion, will be protected in a reliance upon those acts."

Symmes v. Union Trust Co., 60 Fed. 855 (1894): "In reference to the acts and conduct of complainants and their participation and acquiescence in the various transactions, it must be remembered that the doctrine of *ultra vires* has two separate and distinct phases, — one, where the public or creditors are concerned, which has no application to this case; the other, where the question is between the stockholders and the corporation, or between it and its stockholders and third parties dealing with it and through it with them."

¹ Where minority stockholders who opposed a transfer of corporate assets for stock, subscribed for their proportion under protest, and permitted the purchasing corporation to transact business for eighteen months, it was held that they were then estopped to ask for a rescission. *Post v. Beacon Pump, etc. Co.*, 84 Fed. 371 (1898).

A stockholder who accepts his shares of the stock cannot complain of the transaction. *Feld v. Roanoke Inv. Co.*, 123 Mo. 603 (1894), (27 S. W. Rep. 635). See also *Glymont Imp. Co. v. Toller*, 80 Md. 278 (1894), (30 Atl. Rep. 651).

Stockholders, after voting for and approving a sale or purchase, cannot be heard to complain thereof in equity.

McGeorge v. Big Stone Gap Imp't. Co., 57 Fed. 262 (1893); *Burr v. Pittsburgh, etc. Co.*, 51 Fed. 33 (1892).

See also generally as to estoppel against stockholders, *Sheldon, etc. Co. v. Eickemeyer, etc. Co.*, 90 N. Y. 667 (1882); *Berry v. Broach*, 65 Miss. 450 (1888), (4 So. Rep. 117).

² Sir John Romilly in *Gregory v. Patchett*, 33 Beav. 602 (1864), thus stated the position of stockholders who acquiesce and outstay their time: "Shareholders cannot lie by, sanctioning, or by their silence at least acquiescing in, an arrangement which is *ultra vires* of the company to which they belong, watching the result; if it be favorable and profitable to themselves, to abide by it and insist on its validity, but if it prove unfavorable and disastrous, then to institute proceedings to set it aside." See also *Watt's Appeal*, 78 Pa. St. 370 (1875).

³ *Boston, etc. R. Co. v. New York, etc. R. Co.*, 13 R. I. 260 (1881). *Evans v. Smallcomb*, L. R. 3 H. L. 249 (1868).

⁴ *Cumberland Coal Co. v. Sherman*, 30 Barb. (N. Y.) 553 (1859).

⁵ A transferee stands in no better position than the holder of the stock at the time of the transaction. *Brown v. Duluth, etc. R. Co.*, 53 Fed. 889 (1893). *Re Syracuse, etc. R. Co.*, 91 N. Y. 1 (1883).

means of knowledge, readily available, may be, in legal effect, equivalent to knowledge.¹ No rule can be laid down for determining what length of time will constitute unreasonable delay. It will depend upon the facts and circumstances of each case.²

§ 117. **Effect of Sale of Entire Corporate Property.** — A sale of the entire property of one corporation to another may render the vendor corporation unable to fulfil the purposes of its organization, but does not dissolve it.³ A corporation may exist without property.

II. *Exchange of Property of One Corporation for Stock of Another.*

§ 118. **Transfer of Entire Corporate Property without Unanimous Consent requires Monetary Consideration.** — Upon the

¹ *Jessup v. Illinois Central R. Co.*, 43 Fed. 483 (1890). See also *Taylor v. Railroad Co.*, 4 Woods (U. S.), 575 (1882).

² *Connecticut*: Seven years' delay a bar. *Banks v. Judah*, 8 Conn. 145 (1830), (the earliest reorganization case). Six months' delay after the annual meeting not a bar. *Byrne v. Schuyler Electric Mfg. Co.*, 65 Conn. 336 (1895), (31 Atl. Rep. 833.)

Georgia: *Alexander v. Searcy*, 81 Ga. 536 (1888), (8 S. E. Rep. 630), four years' delay a bar to stockholder's suit.

Louisiana: *Hancock v. Holbrook*, 40 La. Ann. 53 (1888), (3 So. Rep. 351), two years' delay a bar.

Massachusetts: *Snow v. Boston, etc. Co.*, 158 Mass. 325 (1893), (33 N. E. Rep. 588), one year a bar. *Peabody v. Flint*, 88 Mass. 52 (1863), three and a half years a bar.

Minnesota: *Pinkus v. Minneapolis Linen Mills*, 65 Minn. 40 (1896), (67 N. W. Rep. 643), two years a bar.

Missouri: *Descombes v. Wood*, 91 Mo. 196 (1886), (4 S. W. Rep. 82), four years a bar.

Pennsylvania: *Ashhurt's Appeal*, 60 Pa. St. 290 (1869), seven years a bar.

Rhode Island: *Boston, etc. R. Co. v.*

New York, etc. R. Co., 13 R. L. 260 (1881), twelve years a bar.

England: In *Re Pinto Silver Min. Co.*, L. R. 8 Ch. 273 (1877), Lord Justice James held three years' delay a bar and said: "But when a person, having knowledge of what is being done, assents by his trustees to the transfer of the property of the company to another company, being aware that the former company was in course of winding up, and takes no step during the whole of that winding up, it is utterly out of the question that he should be at liberty to come, after the lapse of years, and upset all that has been done."

³ *Price v. Holcomb*, 89 Iowa, 137 (1893), (56 N. W. Rep. 407): "The sale of all the property may have the effect of terminating the business for which the corporation was organized, but it does not dissolve it. Such a sale no more dissolves the corporation than would the giving of a mortgage that might ultimately result in all the property being taken from the corporation."

See also *State v. Bank of Maryland*, 6 Gill & J. (Md.) 205 (1834), (26 Am. Dec. 561); *Brufett v. Great Western R. Co.*, 25 Ill. 353 (1861). Compare *Stone v. Framingham*, 109 Mass. 303 (1872).

winding up of the affairs of a corporation, every stockholder has a right to insist that the property of the corporation be converted into money and that the proceeds be distributed.¹ He has a right to require the valuation of the corporate property to be fixed by a sale.

Similarly, it is the right of every stockholder to demand that sales of corporate assets made preliminary to, and for the purposes of, liquidation shall be for money. He cannot be compelled to accept "chips and whetstones" instead of cash. Whether the exchange of one species of property for another is even a step towards liquidation depends entirely upon their comparative marketableness. An exchange is not a sale.

A transfer of all the property of one corporation for stock in another is an exchange. Its legality depends upon two considerations:

(1) The power of the *corporation* to acquire stock in another corporation.

(2) The power of the *majority* to authorize such transfer.

§ 119. **Exchange of Property for Stock *ultra vires*.**—A private corporation, by the unanimous consent of its stockholders, may exchange its assets for any other property it has power to acquire. The validity of a transfer of the property of one corporation for stock in another therefore depends, primarily, upon the power of the former corporation to acquire the stock.

The general rule that one corporation has no implied authority to acquire and hold stock in another corporation, and the exceptions thereto, are considered at length in another part of this treatise.² Unless the corporation transferring its property has express statutory authority to acquire stock, or the circumstances are such as to bring it within an exception to the rule, a transfer of corporate property for stock in another corporation is *ultra vires*.

It would seem, however, that the objection of *ultra vires* to

¹ *Mason v. Pewabic Mining Co.*, 133 U. S. 50 (1890), (10 Sup. Ct. Rep. 224). *Infringement of Rights of Dissenting Stockholders.*"

See also cases cited in notes to § 120, ² See *post*, Part IV.: "Corporate Stockholding and Control."

an exchange of property for stock when *all* the stockholders agree, might be avoided by directly distributing the stock among the stockholders instead of delivering it to the corporation. If the rights of creditors are protected and stockholders agree, no one else can complain of a donation by a private corporation for the direct pecuniary benefit of its stockholders.

§ 120. **Exchange of Property for Stock Infringement of Rights of Dissenting Stockholders.** — A corporation, having the power to acquire stock in other corporations, may, in ordinary transactions, exercise it in the same manner as other powers.

But a transfer of the entire property of a corporation is an extraordinary transaction requiring unanimous consent, except for liquidating purposes, and for those purposes requiring a pecuniary consideration.

A majority of the stockholders cannot authorize the transfer of the corporate assets for stock in another corporation.¹

¹ *United States*: In *Post v. Beacon Vacuum Pump, etc. Co.*, 84 Fed. 375 (1898), Judge Putnam said: "The minority has a lawful right to maintain that the contractual relations which it established with a corporation whose shareholders they became does not include a contractual relation with any other corporation."

See also *McCutcheon v. Merz Capsule Co.*, 71 Fed. 787 (1896); *Easun v. Buckeye Brewing Co.*, 51 Fed. 156 (1892).

Alabama: *Elyton Land Co. v. Dowdell*, 113 Ala. 186 (1896), (20 So. Rep. 981): "It may be that a private business corporation may sell out its entire property, by and with the consent of less than all its stockholders, for the purposes of paying its debts or for the purposes of dissolution and settlement, but when this is the purpose, it must be clearly understood, and the terms and conditions of the sale must be within the contractual relations between the corporation and its creditors or shareholders. There can be no presumption that a creditor or stockholder of the dissolved corporation will

accept, in payment of his demand, anything but money. He cannot be required to do so arbitrarily."

Connecticut: *Byrne v. Schuyler Electric Mfg. Co.*, 65 Conn. 350 (1895), (3 Atl. Rep. 833).

Illinois: *Harding v. American Glucose Co.*, 182 Ill. 628 (1899), (55 N. E. Rep. 577).

Maryland: *Glymont Imp. Co. v. Toller*, 80 Md. 278 (1894), (30 Atl. Rep. 651).

Missouri: *Feld v. Roanoke Investment Co.*, 123 Mo. 614 (1894), (27 S. W. Rep. 635): "Nor can the stock of such new corporation be forced upon the dissenting stockholders in payment of their stock in the original company, who are entitled to payment in money."

New York: *Frothingham v. Barney*, 6 Hun, 372 (1876): "They had no right to exchange the assets of the old association for the corporate stock of any corporations, without the consent of all the stockholders. . . . Equally were they without authority in making this partial exchange, without such consent. Stockholders of the old association could not thus, against

They cannot force the minority, against their will, into a new company nor compel them to elect between so entering and losing their interests.¹

A possible exception to this rule may arise where the stock, taken upon an exchange, has an established market value, so that it may fairly be considered an *equivalent for money*. In such a case there is, practically, a sale upon a monetary consideration.²

their will, be forced into relations with the new company."

See also *Taylor v. Earle*, 8 Hun, 1 (1876); *People v. Ballard*, 134 N. Y. 269 (1892), (32 N. E. Rep. 54).

Rhode Island : Boston, etc. R. Co. v. New York, etc. R. Co., 13 R. I. 260 (1881).

¹ Notwithstanding the rule stated in the text, transfers of the entire property of corporations, authorized only by a majority of their stockholders, in exchange for the stock of other corporations have been repeatedly made—often in the guise of a "reorganization"—and have sometimes received the approval of the courts. Thus in *Sawyer v. Dubuque Printing Co.*, 77 Iowa, 242 (1889), (42 N. W. Rep. 300), it was held that where a corporation could not carry on a business with profit, and was approaching serious financial embarrassment, the sale, without fraud and in good faith, of all its property to a rival corporation whose paid-up stock was given in payment, afforded no ground of complaint to a stockholder who was not notified of, nor present at, the meeting at which the transfer was decided upon. In this case, however, the question whether an exchange of property for stock was valid was not passed upon by the Court.—And in *Farmers Loan, etc. Co. v. Toledo, etc. R. Co.*, 54 Fed. 759 (1893), it was assumed by Judge Jackson that an exchange of property for stock was a sale, and, from this wrong premise, the conclusion was reached that, under statutory power to sell, a transfer of property for stock by the prescribed majority left the minority remediless.

For other cases where the courts

have, for various reasons, approved the exchange of the assets of one corporation for stock in another, see *Buford v. Keokuk, etc. Packet Co.*, 3 Mo. App. 159 (1876); *Treadwell v. Salisbury Mfg. Co.*, 7 Gray (Mass.), 393 (1856), (66 Am. Dec. 490); *Hodges v. New England Screw Co.*, 1 R. I. 312 (1850).

² The decision in *Treadwell v. Salisbury Mfg. Co.*, 7 Gray (Mass.), 393 (1856), cannot be justified upon principle. In this case the Court said (p. 405): "Nor can we see anything in the proposed sale to a new corporation, and the receipt of their stock in payment, which makes the transaction illegal. It is not a sale by a trustee to himself, for his own benefit; but it is a sale to another corporation for the benefit and with the consent of the *cestuis que trust*, the old stockholders. The new stock is taken in lieu of money, to be distributed among those stockholders who are willing to receive it, or to be converted into money by those who do not desire to retain it. Being done fairly, and not collusively, as a mode of payment for the property of the corporation, that transaction is not open to valid objection by a minority of the stockholders."

The rights of minority stockholders cannot be made to depend upon their ability to convert into money stock which has no established market value—is not regularly bought and sold. Compare *Eason v. Buckeye Brewing Co.*, 51 Fed. 156 (1892); *Byrne v. Schuyler Electric Mfg. Co.*, 65 Conn. 336 (1895), (31 Atl. Rep. 833); *Buford v. Keokuk, etc. Packet Co.*, 3 Mo. App. 159 (1876). Compare also decision of

In order to avoid the objection that dissenting stockholders cannot be forced into a new corporation, reorganization plans have often provided that stockholders who do not choose to go into the new or purchasing company may take a stated sum of money in lieu of the shares to which they would be entitled. The objection to a plan of this character is that the majority have no right to fix the value of the property of the minority.¹ As said by Mr. Justice Miller in *Mason v. Pewabic Mining Co.*:² "It is further said that, in the present case, the dissenting stockholders are not compelled to enter into a new corporation with a new set of corporators, but have their option, if they do not choose to do this, to receive the value of their stock in money. It seems to us that there are two insurmountable objections to this view of the subject. The first of these is that the estimate of the value of the property which is to be transferred to the new corporation and the new set of stockholders is an arbitrary estimate made by this majority, and without any power on the part of the dissenting stockholders to take part, or to exercise any influence, in making this estimate. They are, therefore, reduced to the proposition that they must go into this new company, however much they may be convinced that it is not likely to be successful, or whatever other objection they may have to becoming members of that corporation, or they must receive for the property which they have in the old company a sum which is fixed by those who are buying them out. The injustice of this needs no comment. If this be established as a principle to govern the winding up of dissolving corporations, it places any unhappy minority, as regards the interest which they have in such corporation, under the absolute control of a majority, who may themselves, as in this case, constitute the

the Chancellor in *Black v. Delaware, etc. Canal Co.*, 22 N. J. Eq. 415 (1871).

¹ *Mason v. Pewabic Mining Co.*, 133 U. S. 50 (1890), (10 Sup. Ct. Rep. 224). See also *Post v. Beacon Vacuum Pump, etc. Co.*, 84 Fed. 375 (1898), where it was said: "There is no right in law to compel it [the minority] to elect be-

tween such new contractual relations and the loss of its shares in the old corporation, or compensation for them on any arbitrary basis which a reorganization may give."

² *Mason v. Pewabic Mining Co.*, 133 U. S. 58 (1890), (10 Sup. Ct. Rep. 224).

new company, and become the purchasers of all the assets of the old company at their own valuation."

§ 121. **Appraisal of Stock of Dissenting Stockholders.** — Several of the statutes, already referred to, providing for the appraisal of the shares of dissenting minority stockholders, are probably broad enough to be available in aid of a reorganization through the transfer of corporate assets in exchange for stock.¹ Theoretically, such statutes, when constitutionally applicable, may do exact justice to a dissenting stockholder. He is given the option of entering the new corporation or selling out for the value — fixed by appraisal — of his interest in the old. The result is apparently so equitable that it has been intimated by the Supreme Court of the United States that a court of equity, without such a statute, might be justified in itself appraising the interests of minority stockholders.² It is, however, fundamentally wrong in principle and should not be extended by judicial legislation.

If the business of a corporation is not to be continued according to the contract of association, each stockholder is entitled to his *actual* distributive share of the proceeds of the corporate property. A court of equity cannot equitably

¹ See *ante*, § 57: "*Statutory Provisions for Appraisal of Stock.*"

The English statute applicable in case of transfers of corporate property for stock is contained in Companies Act 1862 (25 and 26 Vict. ch. 89, § 161): "Where any company is proposed to be or is in the course of being wound-up altogether voluntarily, and the whole or a portion of its business and property is proposed to be transferred or sold to another company, the liquidators of the first mentioned company may, with the sanction of a special resolution of the company by whom they were appointed, . . . receive in compensation or in part compensation for such transfer or sale, shares, policies or other like interests in such other company, for the purpose of distribution, amongst the members of the company being wound up."

Section 161 also provides that dis-

sident stockholders may require the liquidator to purchase their interests.

Section 162 provides for determining the price by arbitration.

For construction of this statute see *In re London, etc. Bread Co.*, 62 L. T. Rep. 224 (1890); *In re Imperial Mercantile Credit Ass'n*, L. R. 12 Eq. 504, (1871); *Southall v. British Mutual Life Assur. Soc.*, L. R. 6 Ch. App. 614 (1871); *In re Irrigation Co.*, L. R. 6 Ch. App. 176 (1871); *Clinch v. Financial Corp.*, L. R. 4 Ch. App. 117 (1868).

See also *Pennsylvania* appraisal statute, Laws 1901, Act No. 20, p. 53.

² *Mason v. Pewabic Min. Co.*, 133 U. S. 50 (1890), (10 Sup. Ct. Rep. 224). See conclusion of opinion of Justice Miller and opinion of Justice Bradley. See also *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 42 (1858), (72 Am. Dec. 685); *McVicker v. Ross*, 55 Barb. (N. Y.) 247 (1869).

put him off by securing for him “*a theoretical distributive share*” fixed by appraisal.¹

§ 122. **Stock received upon Exchange belongs primarily to Corporation.** — When the property of a corporation is duly transferred to another corporation for its shares of stock, the title to such shares — the consideration for the transfer — vests, in the absence of express agreement otherwise, in the vendor corporation, as a distinct corporate entity. The stock so acquired becomes the property of the corporation — in lieu of the property transferred — and the stockholders of the corporation have only an indirect interest therein, through their interest in the corporation as a whole. The stockholders own the corporation but the corporation owns the stock. The powers of the corporation, under its charter, will determine the question whether the stock so acquired can be permanently held, or whether the immediate winding up of the corporation’s affairs and distribution of the stock is necessary. But whether distributed sooner or later, the stockholders take only through the distribution.²

By unanimous consent, however, a corporation may make a donation of its property. If creditors are provided for and stockholders are satisfied, no one else can complain. Under like conditions, a corporation, exchanging its property for stock in another corporation, may enter into a valid agreement that such stock, instead of being delivered to it — the corporation — shall be directly divided among its stockholders *pro rata*. This amounts to a liquidation of the corporation’s affairs by unanimous consent, but, in the absence of a con-

¹ 4 Thompson Corp. § 4543.

² In *Kohl v. Lilienthal*, 81 Cal. 378 (1889), (20 Pac. Rep. 401), two corporations sold their property to a third corporation, under an agreement that its stock should be delivered in payment, and stockholders of a vendor company brought suit asking that the stock should be divided among them. The Court held that as the former companies had not passed out of existence nor been dissolved, the new stock, received in payment for their property,

belonged to them and could not be divided among their stockholders until after the dissolution of the corporations in the manner provided by statute.

It appears, however, that there was an agreement that the new stock should be divided among the stockholders and the decision is opposed to the weight of authority except when placed upon the ground that the laws of California permit the liquidation of corporations only in the statutory way. See also *Martin v. Zellerbach*, 38 Cal. 309 (1869).

trolling statute, there is no legal objection to it; and, between the parties, it is a contract, upon a valid consideration, for the benefit of a third party — the stockholders — which generally, under modern codes, gives such party a right of action upon it.¹ When such an express agreement is made, therefore, the stockholders may maintain an action directly against the purchasing corporation to compel the delivery of the stock to them, but without such agreement an action can be maintained only by and for the corporation itself.

III. *Rights and Remedies of Creditors.*

§ 123. **Liability of Purchasing Corporation for Debts of Vendor Company.** — A corporation in selling its entire property,

¹ In *Anthony v. American Glucose Co.*, 146 N. Y. 407 (1895), (41 N. E. Rep. 23), a new corporation having been organized by the transfer to it of the property of several corporations, upon an agreement that payment for the transfer should be made by apportioning to the original stockholders the whole of the stock of the new corporation not reserved for the use of the treasury, certain stockholders in one of the original corporations brought an action against the new corporation for a delivery of its stock to them, and it was held that the action was maintainable against the new corporation, and that such stockholders were not to be turned over for relief to their original corporation after all its functions had ceased, although it might not be wholly dead — it appearing that the new corporation owed a contract duty directly to the individual corporators and not to their corporate entities.

The Court said (p. 413): "We have, of late, refused to be always and utterly trammelled by the logic derived from corporate existence where it only serves to distort or hide the truth, and I think we should not hesitate in this case to reject the purely technical defence attempted. For nothing is plainer than that the transfer of the property and business of the five original com-

panies to the new company to be organized was upon an agreement between the corporators of them all that payment for the transfer should be made by apportioning to the original stockholders the whole of the stock of the new company, not reserved for the use of the treasury. That agreement is not denied by anybody, and every word and every act of all the companies, and of each and all of the corporators, have proceeded upon that assumption. The companies, as corporate entities, could not, alone and without the consent of their constituent members, make a transfer which was intended to end their whole practical business existence, and it was agreed by such companies when they made the written contract among themselves that the refusal of any one corporator, in any one company to give his consent to the transfer should turn the proposed sale into a mere lease. The authority of the corporations to sell and make a valid agreement of sale to which the new company could become a party, was upon the explicit and understood condition that the new stock should be issued in exchange for the old stock to the several corporators, and the necessary consent of the stockholders was given upon that express condition." See also *Hatch v. American Union Tel. Co.*, 9 Abb. N. C. (N. Y.) 223 (1881.)

with the approval of all or a majority of its stockholders, — as the occasion may require — is governed by the same general principles of law applicable to natural persons. It cannot transfer its property in fraud of its creditors. It may not so dispose of all its assets as to leave nothing for its creditors, and if it attempts such transfer the creditors may follow the property. But it may, in good faith, for a valuable consideration, sell its entire property to another corporation, and the purchaser will take the property free from all incumbrances, except specific liens and equitable liens of which it has notice, and will not be liable in any way for the debts of the vendor company.¹ The purchase price takes the place of the property sold, as respects creditors, and they have no rights of action, legal or equitable, against the purchaser or the property.

The doctrine that the property of a corporation is a trust fund for the payment of its debts does not prevent its transfer in good faith for a valuable consideration.² As said by Mr. Justice Field in *Fogg v. Blair*:³ “That doctrine only means that the property must first be appropriated to the payment of the debts of the company before any portion can be dis-

¹ *United States*: *Gray v. National Steamship Co.*, 115 U. S. 116 (1885), (5 Sup. Ct. Rep. 1166.)

Arkansas: *Sappington v. Little Rock, etc. R. Co.*, 37 Ark. 23 (1881).

Illinois: *Brufett v. Great Western R. Co.*, 25 Ill. 353 (1861).

Iowa: *Warfield v. Marshall, etc. Co.*, 72 Iowa, 666 (1887), (34 N. W. Rep. 467, 2 Am. St. Rep. 263).

Kentucky: *Chesapeake, etc. R. Co. v. Griest*, 85 Ky. 619 (1887), (4 S. W. Rep. 323, 30 Am. & Eng. R. Cas. 149).

Missouri: *Powell v. North Missouri R. Co.*, 42 Mo. 63 (1867).

Nebraska: *Campbell v. Farmers, etc. Bank*, 49 Neb. 143 (1896), (68 N. W. Rep. 344).

Tennessee: *First National Bank v. North Alabama, etc. Co.*, 91 Tenn. 12 (1891), (18 S. W. Rep. 400).

Wisconsin: *Pennison v. Chicago, etc.*

R. Co., 93 Wis. 344 (1896), (67 N. W. Rep. 70).

As to equitable liens see *Union Pacific R. Co. v. McAlpine*, 129 U. S. 305 (1889), (9 Sup. Ct. Rep. 286).

A corporation buying all the property of another corporation and assuming its name is not identical with it. *Huggins v. Milwaukee Brewing Co.*, 10 Wash. 579 (1895), (39 Pac. Rep. 152). Compare, however, *Island City Savings Bank v. Schattchen*, 67 Tex. 420 (1887), (3 S. W. Rep. 733); *Lehigh Mining, etc. Co. v. Kelly*, 64 Fed. 401, (1894).

² *Chattanooga, etc. R. Co. v. Evans*, 66 Fed. 809, (1895); *Fogg v. Blair*, 133 U. S. 534 (1890), (10 Sup. Ct. Rep. 338); *Hollins v. Iron Co.*, 150 U. S. 371 (1893), (14 Sup. Ct. Rep. 127). Compare *Montgomery, etc. R. Co. v. Branch*, 59 Ala. 139 (1877).

³ *Fogg v. Blair*, 133 U. S. 541 (1890), (10 Sup. Ct. Rep. 338).

tributed to the stockholders; it does not mean that the property is so affected by the indebtedness of the company that it cannot be sold, transferred, or mortgaged to *bona fide* purchasers for a valuable consideration, except subject to the liability of being appropriated to pay that indebtedness. Such a doctrine has no existence."

The principle that a purchasing corporation is not responsible for the debts of its vendor does not, in any way, interfere with its right to make such contracts as it may deem expedient. It may, as a part of the consideration, assume and agree to pay the debts of the vendor company,¹ or, what is equivalent, may purchase the property subject to the payment of all the indebtedness of the vendor.² In either case the creditors may bring suit directly against the purchaser. The right of action of any creditor is, however, based entirely upon the assumption clause of the contract, and the fact that the purchaser has agreed to pay certain debts does not make it liable for others.³

§ 124. **Fraudulent Sales.** — The general rules of law relating to fraudulent conveyances are equally applicable to corporations and individuals. Conveyances in which actual fraud appears are, manifestly, void. Transfers, constructively fraudulent when made by individuals, are of the same character when made by corporations. From the nature of corporations, however, intercorporate sales sometimes present cases of constructive fraud of their own kind.

¹ *Iowa*: *Benesh v. Mill Owners Mut., etc. Ins. Co.*, 103 Iowa, 465 (1897), (72 N. W. Rep. 674).

Kansas: *Baker v. Harpster*, 42 Kan. 511 (1889), (22 Pac. Rep. 415).

Nebraska: *Tecumseh National Bank v. Best*, 50 Neb. 518 (1897), (70 N. W. Rep. 41); *Austin v. Tecumseh National Bank*, 49 Neb. 412 (1896), (68 N. W. Rep. 628).

New York: *Fernschild v. Yuengling Brewing Co.*, 154 N. Y. 667 (1898), (49 N. E. Rep. 151.)

Tennessee: *Wall v. Chattanooga Co.*, 38 S. W. Rep. 278 (1896); *Planters Ins. Co. v. Wickes*, 4 S. W. Rep. 172 (1887).

² In *Chicago, etc. R. Co. v. Lundstrom*, 16 Neb. 254 (1884), (20 N. W. Rep. 198), the property was bought, under the Nebraska statute, subject to "all liens, incumbrances or indebtedness" existing against the vendor corporation, and in *Plainview v. Winona, etc. R. Co.*, 36 Minn. 505 (1887), (32 N. W. Rep. 749), the purchase was made "subject to all demands, claims and rights of action." In both cases the purchasing company was held liable.

³ *Fernschild v. Yuengling Brewing Co.*, 154 N. Y. 667 (1898), (49 N. E. Rep. 151). See also *Hall v. Herter*, 83 Hun (N. Y.), 19 (1894), (31 N. Y. Supp. 692).

Where the assets of a corporation are transferred for stock in another company, if the stock received has a market value and may fairly be considered an equivalent for money, and the transfer is made, in all respects, in good faith, it cannot be set aside by creditors. The shares of stock take the place of the property sold and are liable for the debts of the corporation. Creditors have no ground of complaint. The fund for their benefit is merely changed in form. But, as a general rule, the transfer of corporate assets for stock, whether to a stranger corporation or to a new corporation formed by the stockholders of the old, will be treated as invalid as to creditors, and may be set aside as in fraud of their rights.¹ A corporation which pays only with its own stock does not take as a purchaser for value, without notice, but is put upon inquiry as to the debts of the corporation making the transfer.²

A corporation cannot, directly or indirectly, turn over its property to its stockholders at the expense of its creditors.

¹ *United States*: In *Hibernia Ins. Co. v. St. Louis, etc. Transp. Co.*, 13 Fed. 518 (1882), Judge McCrary said: "A corporation, unlike a natural person, by disposing of all its property, may not only deprive itself of the means of paying its debts, but may deprive itself of corporate existence and place itself beyond the reach of process of law. At all events, equity will not permit the owners of one corporation to organize another, and transfer from the former to the latter all the corporate property, without paying all the corporate debts." In his concurring opinion in this case, Judge Treat said (p. 521): "If the new company has paid the full value of the property acquired, then it may possibly not be answerable; but if it merely issued to the old its stock therefor, why should it not, at least to the extent of that stock, which represents value for property acquired, meet the obligations to which such stock should fairly be held subject?"

Also *Chattanooga, etc. R. Co. v. Evans*, 66 Fed. 810 (1895); *Blair v. St. Louis, etc. R. Co.*, 22 Fed. 36 (1884).

California: *San Francisco, etc. R. Co. v. Bell*, 48 Cal. 398 (1874).

New Jersey: *Couse v. Columbia Powder Mfg. Co.*, 33 Atl. Rep. 297 (1895).

Tennessee: Where a new corporation is organized, through the efforts of the officers of another corporation, for the purpose of acquiring its property, and the transfer is made upon the agreement of the new company to issue to the old a part of its stock, the transaction is void as against the creditors of the old corporation. *Vance v. McNabb Coal, etc. Co.*, 92 Tenn. 47 (1892), (20 S. W. Rep. 424).

² A corporation which purchases all the property of another company, knowing that such company is insolvent, under an arrangement by which a large part of the purchase price will be placed beyond the reach of the creditors, if there are any, is under a duty to inquire as to the existence of unsecured creditors, and is chargeable with all knowledge which such an inquiry would disclose. *Chattanooga, etc. R. Co. v. Evans*, 66 Fed. 810 (1895).

Upon this principle a conveyance of the entire property of an insolvent corporation, under an arrangement whereby the purchase price — in money, bonds or stock — is to be distributed directly to the stockholders of the vendor corporation, is fraudulent and void as to creditors.¹

Where directors of an insolvent corporation are also in the directory of another company, a conveyance of all the assets of the one corporation to the other — these directors participating in the transaction — is *prima facie* fraudulent.² But the fact that both corporations have the same officers and stockholders does not *necessarily* render a conveyance fraudulent as to creditors.³

¹ Where the stockholders of an insolvent corporation convey all its property to another corporation in consideration of mortgage bonds issued by the purchaser on the property, and, without providing for the debts, divide the bonds, *pro rata*, among themselves, such transfer is a fraud on creditors. *Fort Payne Bank v. Alabama Sanitarium*, 103 Ala. 358 (1894), (15 So. Rep. 618).

A provision, in the transfer of the assets of one corporation to another, that stock in the purchasing corporation shall be issued to the stockholders of the vendor corporation renders the transfer fraudulent and void as to creditors, being, in effect, a transfer of property by a debtor with a reservation of an interest therein to itself. *Montgomery Web Co. v. Dienelt*, 133 Pa. St. 585 (1890), (19 Atl. Rep. 428).

A transfer by a corporation of all its property to another corporation, in consideration of the assumption of debts and the issuance of stock, which is carried out by the delivery of such stock to individual stockholders of the grantor, is *prima facie* fraudulent as to creditors. *Couse v. Columbia Powder Mfg. Co.* (N. J. 1895), 33 Atl. Rep. 297.

See also *Grenell v. Detroit Gas Co.*, 112 Mich., 73 (1897), (70 N. W. Rep. 413); *Jones v. Arkansas Mechanical and Agricultural Co.*, 38 Ark. 17 (1881); *Chattanooga, etc. R. Co. v. Evans*, 66 Fed. 810 (1895).

² Where the directors of an insolvent corporation ordered the conveyance of all its property to secure a debt due from it to another corporation, at a meeting in which several directors who voted for the resolution authorizing the conveyance were also directors of the corporation for whose benefit the conveyance was made, it was *held* that the conveyance so authorized was *prima facie* fraudulent as to creditors, and would be declared void, unless it was clearly shown that it was fair and reasonable, and absolutely free from fraud. *Sweney v. Grape Sugar Refining Co.*, 30 W. Va. 443 (1887), (4 S. E. Rep. 431).

See also *Banks v. Judah*, 8 Conn. 145 (1830); *Levins v. Peoples Grocery Co.* (Tenn. 1896), 38 S. W. Rep. 733.

³ *Cole v. Millerton Iron Co.*, 133 N. Y. 164 (1892), (30 N. E. Rep. 847), *affirming* 59 Hun, 217 (1891), (13 N. Y. Supp. 851).

In *Warfield v. Marshall County Canning Co.*, 72 Iowa, 666 (1887), (34 N. W. Rep. 467), it was *held* that a sale by a failing corporation of all its property to another corporation, which agreed to pay its obligations to the full value of the property sold, would not be set aside as fraudulent, because the stockholders of the first formed a part of stockholders of the second corporation,

§ 125. **Remedies of Creditors.** — There are several remedies open to creditors in the case of fraudulent conveyances by debtor corporations.

1. A creditor may subject the consideration for the sale, money, stocks, bonds or other property, when received by the vendor corporation — his debtor — to the payment of his debt in such manner, by execution sale or otherwise, as the statutes may permit.¹ This course may be taken in every case, without regard to the fraudulent character of the transaction, for corporate property is always liable to be taken for corporate debts.

2. A creditor, having established the validity of his claim at law,² may seek the aid of a court of equity to follow the corporate property into the hands of the purchaser and apply it, or its avails, in payment of his judgment debt.³ A court of equity may grant this relief, or may charge the purchaser with

there being no fraudulent purpose shown.

See also *Barr v. Bartram, etc. Mfg. Co.*, 41 Conn. 506 (1874).

¹ Where the assets of a corporation were transferred to a new company, formed for the purpose of acquiring them, the consideration of the transfer being the issue of stock, the stock so issued to the old corporation cannot be appropriated by shareholders to the detriment of creditors, but it is liable for the corporate debts. *Vance v. McNabb Coal, etc. Co.*, 92 Tenn. 47 (1892), (20 S. W. Rep. 424).

² *Swan Land, etc. v. Frank*, 148 U. S. 603 (1893), (13 Sup. Ct. Rep. 691), citing *Nat. Tube Works v. Ballou*, 146 U. S. 517 (1892), (13 Sup. Ct. Rep. 165); *Scott v. Neely*, 140 U. S. 106 (1891), (11 Sup. Ct. Rep. 712); *Taylor v. Bowker*, 111 U. S. 110 (1884), (4 Sup. Ct. Rep. 397). But see *Blanc v. Paymaster Min. Co.*, 95 Cal. 524 (1892), (30 Pac. Rep. 765).

³ In *Ewing v. Composite Brake Shoe Co.*, 169 Mass. 73 (1897), (47 N. E. Rep. 241), Judge Lathrop said: "It is obvious, however, that where a new corporation is formed, the creditors of the old

corporation do not, without something further being done, become creditors of the new corporation. They have an equitable right to follow the assets of the old corporation; but they cannot maintain an action at law against the new corporation, for there is no privity of contract. To render the new corporation liable there must be a new contract made, such as will amount to a novation."

While a reorganized corporation may not be liable for the debts of the original corporation, the property acquired from it may be reached by its creditors in the hands of a reorganized corporation. *Marshall v. Western North Carolina R. Co.*, 92 N. C. 322 (1885).

See also *Schleider v. Dielman*, 44 La. Ann. 62 (1892), (10 So. Rep. 934); *Bram v. Merchants Ins. Co.*, 16 Fed. 140 (1883); *Hibernia Ins. Co. v. St. Louis, etc. Transp. Co.*, 10 Fed. 596 (1882), s. c. 13 Fed. 516 (1882); *First Nat. Bank v. Chattanooga, etc. Co.*, 97 Tenn. 308 (1896), (37 S. W. Rep. 8). Also *Montgomery, etc. R. Co. v. Branch*, 59 Ala. 139 (1877), considered in *Central R., etc. Co. v. Pettus*, 113 U. S. 116 (1885), (5 Sup. Ct. Rep. 387).

the value of the property, upon the ground, already noticed, that the assets of a corporation constitute, in equity, a fund for the payment of its debts, and cannot be diverted therefrom and nothing left.¹ Judgment creditors may also be entitled to the aid of a receiver in following corporate assets.²

3. Upon the same principle, a creditor may charge stockholders who have received shares of stock or other property forming the consideration for a sale of corporate assets, as trustees for his benefit.³ The property belongs, in equity, to the corporation to be held for the benefit of its creditors. It constitutes the purchase price for the sale of the property, and when stockholders divert it to themselves, they appropriate trust funds and are chargeable therefor.

4. A creditor may institute an action at law against his debtor—the vendor corporation—and, where attachments are permitted, may attach the corporate property so transferred as being still the property of his debtor, or may levy execution thereon after judgment.⁴ This action is predicated

¹ *Grenell v. Detroit Gas Co.*, 112 Mich. 73 (1897), (70 N. W. Rep. 413): “A corporation cannot sell all its property and take in payment stock in a new corporation under an arrangement that has the effect of distributing the assets of the vendor among its stockholders to the exclusion and prejudice of its creditors; and a company making such a purchase, in consideration of the issue of its own stock to such stockholders, takes the property subject to the rights of creditors. Such an arrangement is a diversion of the trust fund.”

² *Barclay v. Quicksilver Min. Co.*, 6 Lans. (N. Y.) 25 (1872), (9 Abb. Pr. n. s. 283). See also *Alexander v. Relfe*, 74 Mo. 495 (1881); *Couse v. Columbia Powder Mfg. Co.* (N. J. 1895), 33 Atl. Rep. 297.

³ Where the assets of a corporation are transferred to another company and the proceeds are divided among its stockholders, in proportion to the amount of their stock, they are *trustees for creditors* as to the amount received,

the transaction being, in effect, a distribution of such assets by the company to its own stockholders.

Hill v. Gruell, 42 Ill. App. 411 (1891). See also *Panhandle Nat. Bank v. Emery*, 78 Tex. 498 (1890), (15 S. W. Rep. 23); *McKusick v. Seymour, Saben & Co.*, 48 Minn. 172 (1892), (50 N. W. Rep. 1116).

Where, upon a sale of the entire property of a corporation to another company for its bonds, an arrangement is made whereby the bonds are divided directly among its stockholders, such an arrangement is void as to the creditors, and the bonds belong to them. *Fort Payne Bank v. Alabama Sanitarium*, 103 Ala. 358 (1893), (15 So. Rep. 618); *Chattanooga, etc. R. Co. v. Evans*, 66 Fed. 809 (1895).

⁴ The property of a corporation, transferred to a new corporation for its stock, may still be attached by the creditors of the old company. *McVicker v. American Opera Co.*, 40 Fed. 861 (1889).

A judgment creditor may levy upon

upon the principle that a transfer in fraud of creditors is void as to them.

5. A creditor may hold the purchasing corporation directly responsible when, in taking over the property, it assumes the debts of the vendor.¹

Laches may bar a creditor from seeking relief in equity.²

§ 126. **Priority of Purchaser's Mortgage over Claims of Vendor's Creditors.** — Upon the principle that the assets of a corporation are a trust fund for the payment of its debts, it is sometimes said that creditors have an equitable lien thereon which they may enforce against transferees. The expression can be so used only in a figurative sense. Creditors have no lien before judgment, and after judgment only when given by statute. They may follow property into the hands of a purchaser when transferred, actually or constructively, in fraud of their rights, because, in such a case, equity will disregard forms and treat the property as being held by the purchasing company for their benefit. So equity will disregard or set aside a mortgage made by the purchaser of the property so acquired when the mortgagee takes with knowledge of the whole transaction.³

When, however, the purchaser mortgages the property for a present consideration and the mortgagee acts in good faith, the mortgage takes precedence of claims of creditors who have

and sell upon execution property so transferred.

Montgomery Web Co. v. Dienelt, 133 Pa. St. 585 (1890), (19 Atl. Rep. 428). See also *Prentice v. United States, etc. Steamship Co.*, 78 Fed. 106 (1897).

¹ Where a corporation sells its property to another corporation in payment for stock of the latter, and the new corporation assumes all the liabilities of the old corporation, a creditor of the old corporation may sue the new corporation on his claim. *Friedenwald Co. v. Asheville Tobacco Works*, 117 N. C. 544 (1895), (23 S. E. Rep. 490).

² *Townsend v. St. Louis, etc. Mining Co.*, 159 U. S. 21 (1894), (15 Sup. Ct.

Rep. 997); *Vaughn v. Comet, etc. Co.*, 21 Colo. 54 (1895), (39 Pac. Rep. 422).

³ Where a transfer by a corporation to another company, with the same stockholders, of all its property was without consideration, except the assumption of debts, and the transferee immediately executed a mortgage to secure an issue of bonds, covering its own property and that thus acquired, it was held that the mortgage should be set aside, at least as to bondholders who did not stand as *bona fide* purchasers. *Cole v. Millerton Iron Co.*, 133 N. Y. 164 (1892), (30 N. E. Rep. 847).

Where a sale is set aside as *ultra vires* a mortgage by the vendee is void. *Knoxville v. Knoxville, etc. R. Co.*, 22 Fed. 758 (1884).

not acquired a statutory lien, by judgment or attachment, prior to its execution.¹ This conclusion is not inequitable. It merely gives the same priority to a *bona fide* mortgage made by a purchaser that such a mortgage would have had if made by the debtor, the selling corporation. Questions as to following the avails of a mortgage do not affect its validity.

Notice of the existence of a creditor's claim does not, standing alone, alter the position of a mortgagee.² Knowledge of the fraudulent character of the transfer, as well as of the claim, must be shown.

IV. *Sales of Property of Quasi-public Corporations.*

§ 127. **Indispensable Property cannot be alienated or taken on Execution without Statutory Authority.** — Private corporations, owing no public duties, have power, as already shown, to sell all their property.³ Limitations, for the protection of creditors

¹ In *Fogg v. Blair*, 133 U. S. 538 (1890), (10 Sup. Ct. Rep. 338), Justice Field said: "The property of a railroad company is not held under any such trust to apply it to the payment of its debts as to restrict its use for any other lawful purpose, it matters not how meritorious the demand of the creditor may be. He must obtain a lien upon the property of the company, or security in some other form, or he will have to take his chances with all other creditors to obtain payment in the ordinary course of legal proceedings for the collection of debts."

See also *Lebeck v. Fort Payne Bank*, 115 Ala. 447 (1897), (22 So. Rep. 75).

² In *Fogg v. Blair*, *supra*, Justice Field also said (p. 540): "There is no evidence in the record before us that the parties who took the bonds issued by the St. Louis, Hannibal and Keokuk Railroad Co. had any notice, actual or constructive, of the demand of the complainant. But if they had, it would not have affected their rights. That demand was not then reduced to judgment and created no lien upon the property of the company, nor any restriction upon

the companies' right to use it for any lawful purpose. The bonds were given to raise the necessary funds to complete the road of the company and the mortgage was executed to secure their payment. They were negotiable instruments, and, in the hands of the purchasers, cannot be impeached for any neglect of the company issuing them to pay the demands of other creditors. We are unable to perceive any ground upon which their priority over the claim of the appellant can be, in any way, impaired. We do not question the general doctrine, invoked by the appellant, that the property of a railroad company is a trust fund for the payment of its debts, but do not perceive any place for its application here."

Compare this opinion with those of the circuit judges in same case *sub nom.* *Blair v. St. Louis, etc. R. Co.*, 27 Fed. 176 (1886) (Brewer, J.), 25 Fed. 684 (1885) (Brewer, J.), 24 Fed. 148 (1885) (Treat, J.), and 22 Fed. 36 (1884) (Treat, J.).

³ Ante, § 108: "*Power to purchase and sell generally.*"

and minority stockholders, may be placed upon the exercise of the power, but its existence, as between the corporation and the State, is unquestionable.

Quasi-public corporations — railroad, canal, telegraph, gas and other public utility companies — stand in an essentially different position. These companies enjoy franchises granted by the State, in consideration of the assumption of obligations to the public. As a corollary to the conclusion, elsewhere shown to be established, that corporate franchises cannot be transferred without authority from the State, it follows that corporate property, necessary for the performance of public duties, or, as sometimes stated, essential to the exercise of corporate franchises, cannot be sold or disposed of without such authority.¹ Upon the same principle, it also follows that such essential property is not subject to sale on execution, unless the levy is authorized by statute.² The underlying principle is that property, necessary to enable a corporation to fulfil its obligations to the State, is impressed with a trust in favor of the public.³

¹ *United States*: *Central Transp. Co. v. Pullman Car Co.*, 139 U. S. 24 (1891), (11 Sup. Ct. Rep. 478); *York, etc. R. Co. v. Winans*, 17 How. (U. S.) 30 (1854). See also *Briscoe v. Southern, etc. R. Co.*, 40 Fed. 280 (1889).

Georgia: *Singleton v. Southwestern R. Co.*, 70 Ga. 464 (1883), (48 Am. Dec. 574).

New Hampshire: *Richards v. Merri-mack, etc. R. Co.*, 44 N. H. 127 (1862).

New Jersey: *Black v. Delaware, etc. Canal Co.*, 22 N. J. Eq. 399 (1871).

Pennsylvania: *Foster v. Fowler*, 60 Pa. St. 27 (1868).

Texas: *Missouri Pac. R. Co. v. Owens*, 1 Tex. Civ. Cas. App. § 385 (1883); *Gulf, etc. R. Co. v. Morris*, 67 Tex. 692 (1887), (4 S. W. Rep. 156). See also cases cited in the following note which illustrate the same principle.

² *United States*: *East Alabama R. Co. v. Doe*, 114 U. S. 340 (1885), (5 Sup. Ct. Rep. 869); *Gue v. Tide Water Canal Co.*, 24 How. 257 (1860).

Indiana: *Louisville, etc. R. Co. v. Boney*, 117 Ind. 501 (1888), (20 N. E. Rep. 432); *Indianapolis R. Co. v. State*, 105 Ind. 37 (1885), (4 N. E. Rep. 316).

Kentucky: *Louisville Water Co. v. Hamilton*, 81 Ky. 517 (1883).

North Carolina: *State v. Rives*, 5 Ired. 297 (1844).

Ohio: *Coe v. Columbus, etc. R. Co.*, 10 Ohio St. 372 (1859), (75 Am. Dec. 518).

Pennsylvania: *Youngman v. Elmira, etc. R. Co.*, 65 Pa. St. 278, 286 (1870); *Western Pennsylvania R. Co. v. Johnston*, 59 Pa. St. 290 (1869); *Plymouth R. Co. v. Colwell*, 39 Pa. St. 337 (1861); *Ammant v. New Alexandria Turnpike Co.*, 13 Serg. & R. 210 (1825), (15 Am. Dec. 593); *Leedam v. Plymouth R. Co.*, 5 W. & S. 265 (1843).

Tennessee: *Baxter v. Nashville, etc. Turnpike Co.*, 10 Lea, 488 (1882).

Texas: *City of Palestine v. Barnes*, 50 Tex. 538 (1878).

³ 2 Morawetz Priv. Corp. § 1125.

§ 128. **Test of Indispensability.** — In applying the rule that the property of a *quasi*-public corporation, necessary for the performance of its public duties, cannot, in the absence of statutory authority, be alienated or taken on execution, the courts have sometimes drawn the line of indispensability between the real and the personal property of the corporation — holding that the latter can, and that the former cannot, be sold or taken. Thus, in *Coe v. Columbus, etc. R. Co.*¹ the Supreme Court of Ohio said: “The line can be clearly drawn between the interest in real estate and the franchise connected therewith, and the movable things employed in the use of the franchise.” Upon this principle, it has been held that the road-bed and fixtures of a railroad company,² the road of a turnpike company,³ the canal and locks of a canal company⁴ and the plant of a water company⁵ cannot be seized upon execution; while, on the other hand, it has been held that the rolling stock of a railroad⁶ and the ferry boat of a ferry company⁷ can be taken.

This test of indispensability is illogical. The rolling stock of a railroad is as essential to its use and operation as the road-bed, and neither is more necessary than the other. The foundation of the rule being the indispensability of the property, the assumption that real estate is more necessary than personal property begs the question. The true test should be whether the property, real or personal, is necessary, in a

¹ *Coe v. Columbus, etc. R. Co.*, 10 Ohio St. 379 (1859), (75 Am. Dec. 518). Compare, however, *Central Transp. Co. v. Pullman Car Co.*, 139 U. S. 24 (1891), (11 Sup. Ct. Rep. 478).

² *Coe v. Columbus, etc. R. Co.*, 10 Ohio St. 372 (1859), (75 Am. Dec. 518); *Youngman v. Elmira, etc. R. Co.*, 65 Pa. St. 278, 286 (1870); *Western, etc. R. Co. v. Johnstown*, 59 Pa. St. 290 (1869); *Leedam v. Plymouth R. Co.*, 5 W. & S. (Pa.) 265 (1843).

A portion of a railroad which has been abandoned is subject to levy of execution. *Benedict v. Heineberg*, 43 Vt. 231 (1870).

³ *Ammant v. New Alexandria Turnpike Co.*, 13 Serg. & R. 210 (1825), (15

Am. Dec. 593); *Baxter v. Nashville, etc. Turnpike Co.*, 10 Lea (Tenn.), 488 (1882).

⁴ *Gue v. Tide Water Canal Co.*, 24 How. (U. S.) 257 (1860); *Susquehanna Canal Co. v. Bonham*, 9 W. & S. (Pa.) 27 (1845).

⁵ *Louisville Water Co. v. Hamilton*, 81 Ky. 517 (1883).

⁶ *Louisville, etc. R. Co. v. Boney*, 117 Ind. 501 (1888), (20 N. E. Rep. 432); *Boston, etc. R. Co. v. Gilmore*, 37 N. H. 410 (1858); *Coe v. Columbus, etc. R. Co.*, 10 Ohio St. 372 (1859), (75 Am. Dec. 518).

⁷ *Lathrop v. Middleton*, 23 Cal. 257 (1863), (83 Am. Dec. 112).

reasonable sense, for the performance of the public duties of the corporation.¹ This subject is, however, at the present time, a matter of statutory regulation in nearly all the States.

§ 129. **Sales of Surplus Property.** — Indispensable property, in the absence of statutory authority, cannot be sold. Conversely, surplus property — property which is not indispensable — in the absence of statutory prohibition, may be sold. A *quasi*-public corporation is vested with full *jus disponendi* over all its property, real and personal, which is not necessary to enable it to carry on the business for which it was chartered or to fulfil its public obligations.²

In *Hendee v. Pinkerton*,³ Judge Foster said: “We entertain no doubt that the Grand Junction Railroad and Depot Company could lawfully sell and convey the lands embraced in this bill. They were not acquired to enable the corporation to carry on the business which it was chartered to do for the benefit of the public, nor needed or used for that purpose. Their alienation in no wise impaired or affected the usefulness of the company as a railroad, or its ability to exercise any of its corporate franchises. In the absence of any express or implied legislative prohibition, this corporation possessed all the ordinary rights of ownership over these lands, and could convey them away absolutely or mortgage them to secure any valid indebtedness.”

¹ See an able and comprehensive note to *Brunswick, etc. Co. v. United States Gas Co.*, 35 Am. St. Rep. 390. Also *Short's Railway Bonds & Mortgages*, p. 165.

² *Branch v. Jesup*, 106 U. S. 468 (1882), (1 Sup. Ct. Rep. 495).

Town lots, held by a railroad company, do not pass by a sale of a railroad “with its corporate privileges and appurtenances” unless directly appurtenant to the railroad and indispensably necessary to the enjoyment of its fran-

chises. *Shamokin Valley R. Co. v. Livermore*, 47 Pa. St. 465 (1864). Compare *Platt v. Union Pacific R. Co.*, 99 U. S. 48 (1878).

See also *Yates v. Van De Bogert*, 56 N. Y. 530 (1874): “The company acquired title in fee under that deed. When the land was no longer necessary for the purposes of the corporation it had a right to sell and convey the same.”

³ *Hendee v. Pinkerton*, 14 Allen (Mass.), 386 (1867).

CHAPTER XII.

SALES OF CORPORATE FRANCHISES.

I. *Transferability of Franchises.*

- § 130. Nature of a Franchise.
- § 131. Franchise of Corporate Existence.
- § 132. Transferability of Franchise of Corporate Existence.
- § 133. Franchises of Corporations.
- § 134. Transferability of Franchises of Corporations.

II. *Legislative Authority for Sale of Franchises.*

- § 135. Legislative Authority essential to Alienation of Franchises.
- § 136. Unauthorized Sale of Franchises — *Ultra vires*.
- § 137. Unauthorized Sale of Franchises — Against Public Policy.
- § 138. Unauthorized Sale of Franchises — Unlawful Delegation of Powers.
- § 139. Legislative Authority essential to Purchase of Franchises.

I. *Transferability of Franchises.*

§ 130. Nature of a Franchise. — In *Bank of Augusta v. Earle*¹ Chief Justice Taney defined franchises as “special privileges conferred by government upon individuals and which do not belong to citizens of the country generally, of common right.”² This definition is unexceptionable. The essential pre-requisites to the existence of a franchise are, therefore :

¹ *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 595 (1839).

² *Fietsam v. Hay*, 122 Ill. 294 (1887), (13 N. E. Rep. 501, 3 Am. St. Rep. 493) : “The word *franchise* is often used in the sense of privileges generally, but in its more appropriate and legal sense the term is confined to such rights and privileges as are conferred upon corporate bodies by legislative grant.”

St. Louis, etc. R. Co. v. Balsley, 18 Ill. App. 82 (1885) : “Franchises are rights and privileges acquired only by special grant from the public through the legislature, which impose upon the

grantee, as the consideration therefor, a duty to the public to see that they are properly used.”

Chancellor Kent says that “franchises are privileges conferred by grants from the government and vested in private individuals.” 3 Kent’s Com. 458. See also Bouvier’s Law Dict. “Franchise.” *Chicago, etc. R. Co. v. Dunbar*, 95 Ill. 571 (1880), (1 Am. & Eng. R. Cas. 214). Franchises are “branches of the king’s prerogative, subsisting in a subject by grant from the crown.” 3 Cruise Dig. 278.

1. A grant from the sovereign authority: for there can be no franchise which is not derived from a law of the State.¹

2. A special privilege: for that which belongs to citizens generally can never be a franchise.²

3. A right conferred upon private individuals (or corporations): for privileges granted to public bodies are not franchises.³

Franchises relating to corporations are of two kinds:⁴

1. The franchise to be a corporation, conferred upon the corporators.

2. The franchises of the corporation, conferred upon the corporation.

§ 131. **Franchise of Corporate Existence.** — The legislature, in granting a special charter of incorporation, confers upon the persons named therein — the corporators — the privilege of forming and being a corporation. This privilege may be termed the franchise of corporate existence.⁵ It is

¹ *Woods v. Lawrence County*, 1 Black (U. S.), 409 (1861): "A franchise is a privilege conferred, in the United States, by the immediate or antecedent legislation of an act of incorporation, with conditions expressed, or necessarily inferential from its language, as to the manner of its existence and for its enjoyment."

Bank of Augusta v. Earle, 13 Pet. U. S. 595 (1839): "It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from a law of the State." See also *Wilmington Water Power Co. v. Evans*, 166 Ill. 556 (1897), (46 N. E. Rep. 1083).

² In *California v. Central Pac. R. Co.*, 127 U. S. 40 (1888), (8 Sup. Ct. Rep. 1073), it was said: "Generalized, and divested of the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege, or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be re-

served for public control and administration, either by the government directly, or by public agents acting under such conditions and regulations as the government may impose in the public interest and for the public security."

See also *Abbott v. Omaha Smelting, etc. Co.*, 4 Neb. 420 (1876); *Bridgeport v. New York, etc. R. Co.*, 36 Conn. 255 (1869).

³ 3 Kent's Com. 458.

⁴ In *Fietsam v. Hay*, 122 Ill. 293 (1887), (13 N. E. Rep. 501, 3 Am. St. Rep. 493), the word "franchise" was said to include "the right or privilege of being a corporation, and of doing such things, and such things only, as are authorized by the corporation's charter."

⁵ *Paul v. Virginia*, 8 Wall. (U. S.) 168 (1868). See also *State v. Western Irrigating Canal Co.*, 40 Kan. 99 (1888), (19 Pac. Rep. 349, 10 Am. St. Rep. 166), where the Supreme Court of Kansas, following 2 Morawetz Priv. Corp. § 923, said: "The word 'franchise' is generally used to designate a right, or privilege, conferred by law. What is

true that the State, in enacting general incorporation laws, confers a similar privilege upon those who comply with the provisions of such laws, but this privilege can hardly be termed a franchise. It is not a *special* privilege.

The franchise to be a corporation belongs to the stockholders and not to the corporation. The grantees of the charter are, primarily, the incorporators, and the franchise is vested in them, their associates and successors. The corporation when formed may itself take, under the charter, special rights and privileges — also termed franchises — necessary to carry into effect the objects for which it was formed, but the franchise to be a corporation remains in the stockholders.¹ “A corporation is itself a franchise belonging to the members of the corporation: and a corporation being itself a franchise may hold other franchises, as rights and franchises of the corporation.”² Mr. Justice Matthews, in *Memphis, etc. R. Co. v. Com-*

called the franchise of forming a corporation is really but an exemption from the general rule of the common law prohibiting the formation of corporations. All persons in this State have now the right of forming corporate associations upon complying with the simple formalities prescribed by the statute. The right of forming a corporation and of acting in a corporate capacity, under the general incorporation laws, can be called a franchise only in the sense in which the right of forming a limited partnership, or of executing a conveyance of land by deed, is a franchise.”

In *Young v. Webster City, etc. R. Co.*, 75 Iowa, 143 (1888), (39 N. W. Rep. 234), it was said: “The corporation itself is not a franchise but it is the attributes of the corporation which comprise the franchises thereof,—its special powers and rights.” Compare *Knoup v. Piqua Branch of State Bank*, 1 Ohio St. 614 (1853).

¹ *Fietsam v. Hay*, 122 Ill. 293 (1887), (13 N. E. Rep. 501, 3 Am. St. Rep. 449): “A franchise or the right to be and act as an artificial body is vested in

the individuals who compose the corporation and not in the corporation itself.”

In *Central Trust Co. v. Western North Carolina R. Co.*, 89 Fed. 24 (1898), Judge Simonton said: “This new person, creature of the law, and existing through the grace of and at the will of the sovereign, was then clothed with certain powers, and granted certain privileges. These are its franchises. First, the franchise of existence as a corporation,—its life and its being. This is inseparable from it. When it parts with this franchise, it parts with its life. But, with respect to the other franchises with which it has been clothed,—the right and privilege to act as a common carrier, to carry passengers and goods, to charge tolls, to operate a railroad,—these it enjoys as an individual could, and they are not inseparable from its existence. They are its property. A franchise to be a corporation is distinct from a franchise, as a corporation, to maintain and operate a railroad.”

² *Pierce v. Emery*, 32 N. H. 507 (1856).

missioners,¹ pointed out the distinction between the franchise to be a corporation and the franchises of the corporation: "The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the incorporators, while the powers and privileges, vested in and to be exercised by the corporate body, as such, are the franchises of the corporation."²

§ 132. **Transferability of Franchise of Corporate Existence.** — As the franchise of corporate existence belongs to the stockholders of a corporation, they may, practically, transfer it by the sale of their shares of stock; and, in a sense, the sale of a single share amounts *pro tanto* to a transfer of an interest in this primary franchise. The purchasers, however, merely become stockholders in the same corporation in place of the vendors — the corporate identity remains unchanged.

The franchise to be a corporation, as a franchise, in its nature is incommunicable by act of the parties.³ Neither

¹ *Memphis, etc. R. Co. v. Commissioners*, 112 U. S. 619 (1884), (5 Sup. Ct. Rep. 299). See also *New Orleans, etc. R. Co. v. Delamore*, 114 U. S. 501 (1885), (5 Sup. Ct. Rep. 1009).

² *Wright v. Milwaukee, etc. R. Co.*, 25 Wis. 53 (1869): "The distinction between the franchise of constructing and operating a railroad, and the franchise of being a corporation, and of contracting, suing and being sued as such, is well established."

The franchise to be a corporation is not, strictly, a corporate franchise at all. *Meyer v. Johnston*, 53 Ala. 237 (1875).

³ *Memphis, etc. R. Co. v. Commissioners*, 112 U. S. 619 (1884), (5 Sup. Ct. Rep. 299): "The franchise of becoming and being a corporation, in its nature, is incommunicable by the act of the parties and incapable of passing by assignment."

Commonwealth v. Smith, 10 Allen (Mass.), 455 (1865), *per Hoar, J.*: "The franchise to be a corporation clearly can-

not be transferred by any corporate body, of its own will. Such a franchise is not, in its own nature, transmissible."

A corporation cannot "sell or convey its corporate name, or its right to maintain and defend judicial proceedings or to make and use a common seal." *State v. Western Irrigating Canal Co.*, 40 Kan. 96 (1888), (19 Pac. Rep. 349, 10 Am. St. Rep. 166).

See also *New Orleans, etc. R. Co. v. Delamore*, 114 U. S. 501 (1885), (5 Sup. Ct. Rep. 1009); *Welsh v. Old Dominion Mining, etc. Co.*, 56 Hun (N. Y.), 650 (1890), (10 N. Y. Supp. 174); *Ragan v. Aiken*, 9 Lea (Tenn.), 603 (1882), (42 Am. Rep. 684, 9 Am. & Eng. R. Cas. 201); *Atkinson v. Marietta, etc. R. Co.*, 15 Ohio St. 21 (1864).

Compare *Miller v. Rutland, etc. R. Co.*, 36 Vt. 452 (1863); *Bank of Middlebury v. Edgerton*, 30 Vt. 182 (1858); *Shapley v. Atlantic, etc. R. Co.*, 55 Me. 395 (1868).

the corporation nor the stockholders can usurp the functions of the legislature and confer upon others the privilege of forming a corporation. As said by Mr. Justice Curtis, at circuit, in *Hall v. Sullivan R. Co.*:¹ "The franchise to be a corporation is, therefore, not a subject of sale and transfer, unless the law, by some positive provision, has made it so, and pointed out the modes in which such sale and transfer may be effected."

Even where a positive statutory provision appears authorizing a corporation to transfer its charter or franchise to be a corporation, the real transaction is, in no sense, a sale or conveyance. The so-called transferee takes nothing from the deed of transfer and everything from the legislative grant of power. The act of the incorporators or stockholders in transferring — in form — their corporate franchise, in legal effect is a surrender of their charter. The legislative authorization amounts to a grant of a new charter — in similar terms — to the transferees, taking effect upon the abandonment of the old. "The vital part of the transaction, and that without which it would be a nullity, is the *law* under which the transfer is made."²

§ 133. **Franchises of Corporations.** — The legislature, in conferring a charter of incorporation upon persons about to engage in an enterprise involving the assumption of obligations to the public, generally grants such special rights as may be necessary to enable the corporation, so created, to carry into effect the objects of its creation. These special privileges constitute the franchises of the corporation.³ Thus, in years

¹ *Hall v. Sullivan R. Co.*, 21 Law Rep. 138 (1857), (1 Brunner Coll. Cas. 613, 11 Fed. Cas. 257).

² *State v. Sherman*, 22 Ohio St. 428 (1872), approved in *Memphis, etc. R. Co. v. Commissioners*, 112 U. S. 609, 619 (1884), (5 Sup. Ct. Rep. 299). Compare *Abbott v. New York, etc. R. Co.*, 145 Mass. 453 (1888), (15 N. E. Rep. 91).

³ In *Society for Savings v. Coite*, 6 Wall. (U. S.) 606 (1867), Mr. Justice Clifford said: "Corporate franchises

are legal estates vested in the corporation itself as soon as it is *in esse*. They are not mere naked powers granted to the corporation, but powers coupled with an interest, which vest in the corporation upon the possession of its franchises, and whatever may be thought of the incorporators, it cannot be denied that the corporation itself has a legal interest in such franchises."

A franchise of a corporation may be defined as a right of a corporation to exercise powers and privileges vested in

past, legislatures have granted to innumerable corporations franchises to build bridges, construct turnpike roads, dig and operate canals, maintain ferries, and collect tolls thereon;¹ and, in the present, franchises are granted in constantly increasing numbers for the occupancy of the public streets and highways by the various public utility corporations.²

A railroad company is also an example — the most conspicuous — of a corporation exercising corporate franchises. “The franchises of a railroad corporation,” said Mr. Justice Field in *Morgan v. Louisiana*,³ “are rights or privileges which are essential to the operations of the corporation, and without which its roads and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like.”

The franchise of a railroad company may also be defined as the right, by virtue of the power of eminent domain, to construct, maintain, and operate a railroad upon the route designated in its charter, and to take tolls for the transportation of persons and property thereon.⁴

it by its charter. *Spring Valley Water Works v. Schottler*, 62 Cal. 69 (1882).

¹ That the right to collect tolls upon bridges, turnpike roads, etc., is a franchise, see *Turnpike Road Co. v. Campbell*, 44 Cal. 89 (1872); *Blake v. Winona, etc. R. Co.*, 19 Minn. 418 (1872); *Sellers v. Union Lumbering Co.*, 39 Wis. 525 (1876).

² That the right to lay gas pipes in the streets of a city is a franchise derivable from the State, see *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242 (1878); *State v. Cincinnati Gas Light, etc. Co.*, 18 Ohio St. 262 (1868). Compare, however, *Maybury v. Mut. Gas Light Co.*, 38 Mich. 154 (1878); *Commonwealth v. Lowell Gas Light Co.*, 12 Allen (Mass.), 75 (1866).

The right to lay water-pipes and collect water-rates is a franchise. *Spring Valley Water Works v. Schottler*, 62 Cal. 69 (1882).

It seems that corporations organized

to furnish heat to buildings, through pipes laid in city streets, are not quasi-public corporations to the extent that they are subject to the general principles of law applicable to that class of corporations in the disposition of their privileges and property. *Evans v. Boston Heating Co.*, 157 Mass. 37 (1892), (31 N. E. Rep. 698). See also as to irrigating companies, *State v. Western Irrigating Canal Co.*, 40 Kan. 96 (1888), (19 Pac. Rep. 349).

³ *Morgan v. Louisiana*, 93 U. S. 223 (1876). See also *Lawrence v. Morgan's, etc. Steamship Co.*, 39 La. Ann. 427 (1887), (2 So. Rep. 69, 4 Am. St. Rep. 265); where railroad companies were said to have the right to appropriate land for several purposes other than those stated in *Morgan v. Louisiana, supra*.

⁴ *Colt v. Barnes*, 64 Ala. 108 (1879); *Coe v. Columbus, etc. R. Co.*, 10 Ohio St. 372 (1859).

The franchise to construct and operate a passenger railway in the streets of a city must proceed primarily from the State.¹ If such a franchise is granted directly to a street railway company it becomes a corporate franchise. If the legislature authorize municipal corporations to grant the privilege, the effect of the legislation may be to confer the *franchise* upon the municipality, which may issue a *license* for its exercise. A municipal corporation cannot grant a franchise.²

A franchise of a corporation is to be distinguished from a privilege — in the nature of an exemption — granted to its members or employees. The grant of the former constitutes a contract with the State within the protection of the constitutional provision, while the latter may be revoked at any time.³

The grant of a franchise, unless expressly so stated, is not a contract on the part of the State that it will grant no similar franchises to other corporations. That charters do not confer *exclusive* privileges, unless so expressed, was definitely settled by the Supreme Court of the United States in the celebrated Charles River Bridge case.⁴

¹ The right to construct and operate a street railway in a city, and to take tolls from persons travelling upon the same, is a franchise which the sovereign authority alone can grant. *Denver, etc. R. Co. v. Denver City R. Co.*, 2 Colo. 673 (1875). See also *Milhan v. Sharp*, 27 N. Y. 611 (1863); *People v. Kerr*, 37 Barb. (N. Y.) 357 (1862); *Davis v. New York*, 14 N. Y. 506 (1856). Compare *People v. Sutter St. R. Co.*, 117 Cal. 604 (1897), (49 Pac. Rep. 736).

² Where a company is incorporated by the legislature with power to construct, maintain and operate a railway in a city with the consent of the city, in such manner and upon such conditions as the city may impose, and the city, by ordinance, grants the privilege of constructing and operating the same upon certain streets, the grant by the city is a mere license and not a franchise. The franchise emanates from the State. *Chicago City R. Co. v. People*, 73 Ill. 541 (1874).

See also *Southwark R. Co. v. Philadelphia*, 47 Pa. St. 314 (1864).

³ It is the better view that statutes exempting employees of corporations from militia duty, jury duty, road duty, etc., confer personal privileges upon the employees and may be repealed by the legislature at any time without regard to the existence of a reserved power to repeal. *Neeley v. State*, 4 Lea (Tenn.), 316 (1880). The contrary is, however, held in *Johnson v. State*, 88 Ala. 176 (1889), (7 So. Rep. 253); *Zimmer v. State*, 30 Ark. 677 (1875).

⁴ *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420 (1837). See also *Thompson v. New York, etc. R. Co.*, 3 Sandf. Ch. (N. Y.) 62 (1846). Compare *New Jersey Southern R. Co. v. Long Branch Commrs.*, 39 N. J. L. 28 (1876).

That the franchises of a corporation may be taken by the exercise of the power of eminent domain, see *West River Bridge Co. v. Dix*, 6 How. (U. S.) 507 (1848).

The franchises of a corporation are also to be distinguished from its powers. The former are special privileges; the latter are rights possessed by natural persons generally, and are acquired by a corporation in order to transact business.¹

§ 134. **Transferability of Franchises of Corporations.** — Conversely to the proposition, considered in another section, that a transfer of corporate franchises, without legislative authority, is void,² it follows that such a transfer, with such authority, is valid. When the State which grants the franchises of a corporation consents to their alienation, they become communicable, in whole or in part, in accordance with the consent so given.³

While franchises are generally considered to be incorporeal hereditaments and, therefore, property,⁴ it seems, upon prin-

¹ *State v. Minnesota Thresher Mfg. Co.*, 40 Minn. 213 (1889), (41 N. W. Rep. 1020), where the Court said: "The kinds of business which corporations organized either under title 2, c. 34 (of Gen. Stat. 1878), or under the Act of 1873, are authorized to carry on, are powers, but not franchises, because it is a right possessed by all citizens who choose to engage in it, without any legislative grant. The only franchise which such corporations possess is the general franchise to be or exist as a corporate entity. Hence, if they engage in any business not authorized by the statute, it is *ultra vires*, or in excess of their powers, but not a usurpation of franchises not granted, nor necessarily a misuser of those granted."

For discussion of the distinction between the *property* of a corporation and its franchises, see *Tuckahoe Canal Co. v. Tuckahoe, etc. R. Co.*, 11 Leigh (Va.), 42 (1840); *Bridgeport v. New York, etc. R. Co.*, 36 Conn. 255 (1869); *Miner's Ditch Co. v. Zellerbach*, 37 Cal. 543 (1869).

² See next section.

³ *East Boston, etc. R. Co. v. Eastern R. Co.*, 13 Allen (Mass.), 422 (1866), *per Wells, J.*: "The doctrine that a railroad corporation cannot alienate its franchise is not founded upon any technical theory

nor arbitrary rule, but upon the reasonable implication that such alienation would be contrary to the intention of the legislature and subversive of the purpose for which the franchise was granted. The same considerations apply, only perhaps with greater force, to the subdivision of the franchise by the transfer of a part. . . . But an alienation of the franchise, either in whole or in part, may, undoubtedly, be made, whenever there is legislative authority for it, either in express terms or by reasonable implication."

See also *Vermont, etc. R. Co. v. Vermont Central R. Co.*, 34 Vt. 1 (1861); *Day v. Ogdensburgh, etc. R. Co.*, 107 N. Y. 129 (1887), (13 N. E. Rep. 765).

⁴ In *Enfield Toll Bridge Co. v. Hartford, etc. R. Co.*, 17 Conn. 60 (1845), Chief Justice Williams said in reference to a bridge franchise: "What are the rights of the plaintiffs? They are derived from the grant of the legislature, and are what in law is known to be a *franchise*; and a franchise is an incorporeal hereditament, known as a species of property, as well as any estate in lands. It is property, which may be bought and sold, which will descend to heirs, and may be devised."

See also *Hall v. Sullivan R. Co.*, 21 Law Rep. 138 (1857), (1 Brunner Coll.

ciple, that corporate franchises cannot pass directly from vendor to purchaser in the manner of corporate property. A franchise, in its essence, is a privilege, conferred by grant, to exercise extraordinary powers. A corporation cannot transfer this right any more than a person can transfer an office which he holds; but in the same manner that the office-holder, when authorized, might appoint another to hold the office, the corporation, by the form of sale, may delegate to another corporation the right to exercise the special privileges conferred upon it.¹

This principle is somewhat analogous to the principle, already considered, that the "transfer" of a charter in reality means its surrender and the grant anew of a similar charter to the "transferee."² But there is this fundamental distinction: The exercise of a power of appointment in relation to the franchises of a corporation confers upon the appointee the *same* franchises, while the grant of a new charter confers *similar* franchises. This distinction is of importance where constitutional restrictions have intervened between the grant of the old and the grant of the new charter.

II. *Legislative Authority for Sale of Franchises.*

§ 135. **Legislative Authority essential to Alienation of Franchises.** — It is a rule applicable to all corporations exercising public franchises that such franchises can be transferred only by and with the consent of the State which granted them — that corporate franchises are incommunicable without legislative authority.

The courts have assigned various reasons for the existence

Cas. 613, 11 Fed. Cas. 257). These cases are merely indicative of a long line of decisions.

¹ Compare 2 Morawetz Priv. Corp. § 924.

The words "transfer," "sale" and "lease" are, upon the principles stated in the text, technically incorrect when used in connection with corporate franchises. They are, however, in general

use and express the idea of the passing of franchises — absolutely or for limited terms — from one corporation to another with sufficient accuracy. They will, therefore, be employed in this treatise in order to avoid a cumbersome form of expression.

² Ante, § 132: "*Transferability of Franchise of Corporate Existence.*"

of the rule,¹ of which the following are based upon principles fundamentally sound:

1. The charter of a corporation is the measure of its powers. Unless authority to transfer its franchises is expressly granted, such an act is *ultra vires*.

2. The transfer by a corporation of its franchises—disabling it from the performance of its public duties—is *against public policy*.

3. A corporation exercising public franchises is an agent of the State and, without the consent of the State, cannot *delegate its powers*.

§ 136. **Unauthorized Sale of Franchises — Ultra vires.** — The power to sell its franchises is not to be implied from the usual grant of powers to a *quasi*-public corporation but must be expressly conferred. Any exercise of the power, without the sanction of the legislature, is *ultra vires*.² The principle has

¹ It has sometimes been said, as an additional reason to those stated in the text, that a franchise is deemed a *personal trust* and, therefore, that the State has the right to determine who shall be the recipients of it. But as pointed out in an editorial note to *Brunswick Gas Light Co. v. United Gas, etc. Co.*, 35 Am. St. Rep. 393 (1893): "The theory of a personal confidence reposed in the original corporators rests on a purely arbitrary foundation, . . . and the legislation which has in most, if not all, the States of the Union provided for a free transfer of franchises, as the result of the mortgage thereof, and even for the incorporation of the entirely uncertain body of persons who may purchase at the foreclosure sale, shows very conclusively that, in the opinion of the people of this country, the grounds of public policy upon which this restriction of the power of transfer is to be sustained must be sought in other directions."

Transfers of franchises have also, under certain conditions, been held illegal as tending to create monopolies. See Part V. *post*: "*Combinations of Corporations*."

² *United States*: *Branch v. Jesup*,

106 U. S. 468 (1882), (1 Sup. Ct. Rep. 495); *Mackintosh v. Flint, etc. R. Co.*, 34 Fed. 582 (1888).

Maryland: *State v. Consolidation Coal Co.*, 46 Md. 1 (1876).

Nebraska: *Clarke v. Omaha, etc. R. Co.*, 4 Neb. 458 (1876).

New York: *Troy, etc. R. Co. v. Boston, etc. R. Co.*, 86 N. Y. 107 (1881).

Ohio: *Coe v. Columbus, etc. R. Co.*, 10 Ohio St. 372 (1859).

Pennsylvania: *Pittsburgh, etc. R. Co. v. Bedford R. Co.*, 81½ Pa. St. 104 (1871).

Texas: *East Line, etc. R. Co. v. State*, 75 Tex. 434 (1889), (12 S. W. Rep. 690).

The general rule that any transfer of corporate franchises, without legislative authority, is *ultra vires* is supported by numerous decisions. Those especially relating to *sales* of franchises are cited in the above note and are further considered in § 143, *post*: "*Statutory Authority essential to Sale of Railroad*." Cases illustrating the same principle as applied to *leases* of railroads are collected in note to § 177, *post*; as applied to a transfer through *consolidation*,

thus been stated by the Supreme Court of Pennsylvania: "A corporation, unless specially restricted by its charter, or some statute, has general power to dispose of its property, the whole or part, but it has no right to sell or assign its franchises, either in whole or in part, unless specially authorized by law."¹

§ 137. **Unauthorized Sale of Franchises — Against Public Policy.** — Franchises are conferred upon corporations to enable them to provide facilities of benefit to the public. The consideration for the grant is the discharge by the corporation of its public duties; and public policy forbids a corporation, without legislative authority, to sell its franchises to another corporation and thus render itself incapable of performing those duties.² Mr. Justice Campbell, in *York, etc. R. Co. v. Winans*,³ thus stated the reason of the rule: "Important franchises were conferred upon the corporation to enable it to provide facilities for communication and intercourse required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided, as a remuneration

in § 17, *ante*; as applied to mortgages of franchises in note to § 149, "Short's Railway Bonds and Mortgages."

¹ *Pittsburgh, etc. R. Co. v. Bedford R. Co.*, 81½ Pa. St. 104 (1871). The extract quoted is subject to the criticism that it ignores the principle that the property of a quasi-public corporation — so far as it is indispensable — cannot be disposed of.

² *United States: York, etc. R. Co. v. Winans*, 17 How. (U. S.) 30 (1854).

Georgia: Singleton v. Southwestern R. Co., 70 Ga. 464 (1883).

Massachusetts: Richardson v. Sibley, 11 Allen, 65 (1865).

Illinois: Peoria, etc. R. Co. v. Coal Valley R. Co., 68 Ill. 489 (1873); *Hays v. Illinois, etc. R. Co.*, 61 Ill. 422 (1871).

Nebraska: Cholette v. Omaha, etc. R. Co., 26 Neb. 159 (1889), (41 N. W. Rep. 1106).

New Hampshire: Pierce v. Emery, 32 N. H. 484 (1856).

Ohio: Railroad Co. v. Hinsdale, 45 Ohio St. 556 (1888), (15 N. E. Rep. 665).

Tennessee: Frazier v. Railway Co., 88 Tenn. 138 (1889), (12 S. W. Rep. 537).

Texas: East Line, etc. R. Co. v. Rushing, 69 Tex. 306 (1887), (6 S. W. Rep. 834); *Gulf, etc. R. Co. v. Morris*, 67 Tex. 692 (1887), (4 S. W. Rep. 156).

Virginia: Naglee v. Alexandria, etc. R. Co., 83 Va. 707 (1887), (3 S. E. Rep. 369).

See also *ante*, § 18: "Consolidation of Quasi-public Corporations without Legislative Authority against Public Policy;" *post*, § 143: "Statutory Authority essential to Sale of Railroad;" *post*, § 177: "Lease of Railroad invalid without Legislative Authority."

³ *York, etc. R. Co. v. Winans*, 17 How. (U. S.) 30 (1854).

to the community for their grant. The corporation cannot absolve itself from the performance of its obligations without the consent of the legislature."

§ 138. **Unauthorized Sale of Franchises — Unlawful Delegation of Powers.**— A grant of franchises by the State constitutes the grantee, in a sense, an agent of the State in their exercise, and, upon an elementary principle of the law of agency, *delegatus non delegare*, the corporation — the agent — cannot sell its franchises to another corporation without the consent of the State — the principal. It is immaterial that the intending purchaser agrees to fulfil all the public obligations of the grantee.¹ The State has the right to select the persons who shall enjoy the franchises it grants, as well as those who shall fulfil the obligations due it.

While this reason for the doctrine that there is no implied power to transfer franchises is sound in principle, and has often been stated by the English courts, it is generally given as an additional reason to that of *ultra vires* or the rule of public policy, already considered. Thus, in *Winch v. Birkenhead, etc. R. Co.*,² Vice-Chancellor Parker, while referring to an agreement for "working a line" as a delegation of powers, also said that the agreement was that the company should "part with certain statutory powers which they have no authority to part with, and moreover, that they were to part with them to a body who, by their constitution, cannot accept them."

The rule that a corporation has no implied power to delegate its franchises is essentially different from the rule that it has no power to delegate the performance of its public duties, although both produce the same result. A corporation, upon principles of the law of agency, cannot delegate its powers and franchises. A corporation, as a party to a contract with the State, cannot, for reasons of public policy, transfer its fran-

¹ *Troy v. Rutland R. Co.*, 17 Barb. Counties R. Co., 9 Hare, 306 (1851), (N. Y.) 581 (1854); *Beman v. Rufford*, (12 Eng. L. & Eq. Rep. 224).

² *Winch v. Birkenhead, etc. R. Co.*, 1 Sim. (N. S.) 569 (1851); *Winch v. Birkenhead, etc. R. Co.*, 5 De Gex & S. 562 (1852), (13 Eng. L. & Eq. 506); *Great Northern R. Co. v. Eastern*

chises to others and absolve itself from its obligations to the public assumed in consideration of their grant.

§ 139. **Legislative Authority Essential to Purchase of Franchises.** — The same principles of law which forbid a corporation parting with its franchises, without the consent of the State which granted them, prevent a corporation, without legislative authority, from acquiring franchises granted to another corporation.¹ A corporation has no implied power to purchase corporate franchises and its acceptance of a conveyance of franchises, without authority, would be *ultra vires*.

It is essential to the validity of a contract transferring franchises that both parties should be expressly authorized to enter into it. As said by the Supreme Court of the United States in *Louisville, etc. R. Co. v. Kentucky*:² "It is a fundamental principle in the law of contracts that, to make a valid agreement, there must be a meeting of minds, and, obviously, if there be a disability on the part of either party to enter into the proposed contract there can be no valid agreement." So upon principles of public policy, one corporation, unless permitted by the State, cannot assume and attempt to perform the duties imposed upon another corporation.

¹ *Louisville, etc. R. Co. v. Kentucky*, 161 U. S. 691 (1896), (16 Sup. Ct. Rep. 714); *St. Louis, etc. R. Co. v. Terre Haute, etc. R. Co.*, 145 U. S. 393 (1892), (12 Sup. Ct. Rep. 953); *Central Transp. Co. v. Pullman Car Co.*, 139 U. S. 24 (1891), (11 Sup. Ct. Rep. 478); *Pittsburgh, etc. R. Co. v. Keokuk, etc. Bridge Co.*, 131 U. S. 371 (1889), (9 Sup. Ct. Rep. 770); *Oregon R., etc. Co. v. Oregonian R. Co.*, 130 U. S. 1 (1889), (9 Sup. Ct. Rep. 409); *Pennsylvania Co. v. St. Louis, etc. R. Co.*, 118 U. S. 310 (1886), (6 Sup. Ct. Rep. 1094); *Camden, etc. R. Co. v. May's Landing R. Co.*, 48 N. J. L. 530 (1886), (7 Atl.

Rep. 523); *Gulf, etc. R. Co. v. Morris*, 67 Tex. 692 (1887), (4 S. W. Rep. 156). See also *Rogers v. Nashville, etc. R. Co.*, 91 Fed. 299 (1898).

It has, however, been held that authority given to one corporation to purchase the franchises of a specified corporation gives the latter authority to sell. *New York, etc. R. Co. v. New York, etc. R. Co.*, 52 Conn. 274 (1884).

² *Louisville, etc. R. Co. v. Kentucky*, 161 U. S. 692 (1896), (16 Sup. Ct. Rep. 714). See also *post*, § 144: "*Seller must have Authority to sell, and Buyer to buy.*"

ARTICLE II.

SALES OF RAILROADS.

CHAPTER XIII.

CONTRACT OF SALE AND ITS EXECUTION.

I. *Nature of Sale of Railroad.*

- § 140. Conventional and Judicial Sales of Railroads distinguished.
- § 141. Distinction between Relation of Vendor and Vendee and other Intercorporate Relations.
- § 142. Distinction between Sale of Railroad and Sale of Franchises.

II. *Grants of Power to sell and purchase Railroads.*

- § 143. Statutory Authority essential to Sale of Railroad.
- § 144. Seller must have Authority to sell and Buyer to buy.
- § 145. What Railroads may be the Subject of Sale. Statutory Provisions.
- § 146. Construction of Statutes.
- § 147. Constitutional and Statutory Prohibitions of Purchase of Competing or Parallel Lines.

III. *Authorization and Execution of Contract of Sale.*

- § 148. Statutory Requisites.
- § 149. Assent of Stockholders. Whether Approval of Majority is sufficient.
- § 150. Acquiescence of Stockholders.
- § 151. Rights and Remedies of Dissenting Stockholders.

I. *Nature of Sale of Railroad.*

§ 140. **Conventional and Judicial Sales of Railroads distinguished.**—Sales of railroads by one corporation to another have been, perhaps, the least common form of intercorporate relations. A conjunction of interests has usually been obtained by consolidation, lease, or by the purchase of controlling stock interests. Sales of railroads in foreclosure proceedings have, on the other hand, frequently taken place. The numerous railroad reorganizations in the past ten years have, in nearly every case, required a sale of the railroad and

franchises. There have also been instances of the sale of railroads upon execution.

Conventional sales of railroads involve relations between corporations. Judicial sales involve relations between a corporation and its creditors. The former fall within, the latter without, the scope of this treatise.¹

§ 141. **Distinction Between Relation of Vendor and Vendee and other Intercompany Relations.** — A sale has already been distinguished from a *consolidation* in that the element of succession to rights and liabilities is present in the latter and absent in the former.² The same distinction exists between a sale of a railroad and the form of *reorganization* wherein the stockholders of a railroad company turn over its property and franchises to another corporation, generally formed for the purpose, in exchange for its shares, and divide them directly, or through a distribution, *pro rata* among the stockholders.³ In case of a sale for a valuable consideration and free from fraud, the purchasing corporation takes the property free from charges, except specific liens and equities of which it has notice, and is not liable for the debts of the vendor.⁴ In the case of such a reorganization, however, the corporation, taking the property in exchange for its shares, will be treated as the successor of the old corporation, and, at least to the value of the property received, will be held responsible for its debts.⁵

The distinction between sales of railroads and railroad

¹ A railroad company is a *quasi-public* corporation. The rules governing the sales of property of that class of corporations, considered in §§ 127-129 *ante*, apply to railroad companies. A railroad company exercises franchises, and in their disposition is controlled by the principles examined in the last chapter. Sales of railroads, however, often involve questions peculiarly applicable to them, and there are many statutes especially relating to them. A separate examination of the subject — although involving some repetition of principles — is, therefore, believed to be desirable.

² *Ante*, § 13: "*Distinction between Consolidation and Sale.*"

³ The term "reorganization" is more commonly, and perhaps more exactly, applied to an arrangement between the stockholders and creditors of an insolvent corporation to form a new corporation to take over the assets of the old upon foreclosure sale. Reorganizations in the manner stated in the text have, however, frequently been made. See 3 Cook on Corp. § 884.

⁴ *Ante*, § 123: "*Liability of Purchasing Corporation for Debts of Vendor Company.*"

⁵ *Ante*, § 125: "*Remedies of Creditors.*"

leases, trackage contracts, pools and other agreements, is self-evident.

§ 142. **Distinction between Sale of Railroad and Sale of Franchises.** — The franchises of a railroad company are special privileges conferred by legislative grant. The railroad of a railroad company is property which may have been acquired by the exercise of its franchises.¹

The franchises are inalienable, without legislative authority, because a railroad company cannot delegate its powers and shift its obligations.² The railroad is inalienable, without like authority, because it is impressed with a trust in favor of the public.³

A sale of the franchises of the railroad company alone would not carry its property.⁴ A sale of a railroad, without mentioning franchises, would carry those franchises *necessary* for its operation.⁵

II. *Grants of Power to sell and purchase Railroads.*

§ 143. **Statutory Authority essential to Sale of Railroad.** — As already shown, a sale by a *quasi*-public corporation of its franchises, or of property necessary for the performance of its public duties, is invalid without legislative authority.⁶ A rail-

¹ Tuckahoe Canal Co. v. Tuckahoe, etc. R. Co., 11 Leigh (Va.), 75 (1840): "Now, I take a franchise to be (1) an incorporeal hereditament; and (2) a privilege of authority vested in certain persons by grant of the sovereign (with us, by special statute), to exercise powers, or to do and perform acts which, without such grant, they could not do or perform. Thus, it is a *franchise* to be a corporation, with power to sue and be sued, and to hold property as a corporate body. So it is a *franchise* to be empowered to build a bridge, or keep a ferry, over a public stream, with a right to demand tolls or ferriage; or to build a mill upon a public river, and receive tolls for grinding, etc. But the *franchise* consists in the incorporeal right; the property acquired is not the

franchise. A bank has a right to purchase a banking house; *when purchased*, is the *house* a franchise? Surely not, for it is *corporeal*, whereas a *franchise* is *incorporeal*."

² See *ante*, ch. 12, subdiv. II.: "*Legislative Authority for Sale of Franchises*."

³ See *ante*, § 127: "*Indispensable Property cannot be alienated or taken on Execution without Legislative Authority*."

⁴ That a franchise does not include property gained by the exercise thereof, see *Bridgeport v. New York, etc. R. Co.*, 36 Conn. 255 (1869).

⁵ See *post*, § 157: "*Essential Franchises pass by Sale of Railroad*." *Contra*, *Arthur v. Commercial and Railroad Bank*, 17 Miss. 394 (1848).

⁶ See *ante*, §§ 17, 18 (consolidation); *ante*, §§ 127-129 (indispensable prop-

road company can sell its franchises and indispensable property only when such sale is sanctioned by statute.¹

Mr. Justice Bradley in *Branch v. Jesup*² clearly stated the rule and the reasons therefor: "As a general rule, it is true, a railroad company, with only the ordinary power to construct and operate its road, cannot dispose of it to another company. Legislative aid is necessary to that end. . . . Generally the power to sell and dispose has reference only to transactions in the ordinary course of business incident to a railroad company; and does not extend to the sale of the railroad itself, or of the franchises connected therewith. Outlying lands, not needed for railroad uses, may be sold. Machinery and other personal property may be sold. But the road and franchises are generally inalienable; and they are so not only because they are acquired by legislative grant, or in the exercise of special authority given, for the specific purposes of the incorporating

erty); *ante*, §§ 135-139 (franchises); *post*, § 177 (leases).

¹ *United States*: *Branch v. Jesup*, 106 U. S. 468 (1882), (1 Sup. Ct. Rep. 495, 9 Am. & Eng. R. Cas. 215); *Mackintosh v. Flint, etc. R. Co.*, 34 Fed. 582 (1888).

Georgia: *Singleton v. Southwestern R. Co.*, 70 Ga. 464 (1883).

Maryland: *State v. Consolidation Coal Co.*, 46 Md. 1 (1876).

Massachusetts: *Richardson v. Sibley*, 11 Allen (Mass.), 67 (1865): "A corporation, created for the very purpose of constructing, owning and managing a railroad, for the accommodation and benefit of the public, cannot, without distinct legislative authority, make any alienation, absolute or conditional, either of the general franchise to be a corporation, or of the subordinate franchise to manage and carry on its corporate business, without which its franchise to be a corporation can have little more than a nominal existence."

Nebraska: *Clarke v. Omaha, etc. R. Co.*, 5 Neb. 314 (1877).

New York: *Troy, etc. R. Co. v. Boston, etc. R. Co.*, 86 N. Y. 117 (1881):

"It is well settled that, unless authorized thereto by statute, a railroad corporation, organized under our General Railroad Act, has no authority to transfer or lease its road."

Ohio: *Coe v. Columbus, etc. R. Co.*, 10 Ohio St. 377 (1859): "In the case of a railroad corporation, its franchises and corporate rights are not alienable, without express statutory authority."

Also *Railroad Co. v. Hinsdale*, 45 Ohio St. 556 (1888), (15 N. E. Rep. 665).

Pennsylvania: *Pittsburgh, etc. R. Co. v. Bedford R. Co.*, 81½ Pa. St. 104 (1871).

Tennessee: *Frazier v. Railway Co.*, 88 Tenn. 138 (1889), (12 S. W. Rep. 537).

Texas: *East Line, etc. R. Co. v. Rushing*, 69 Tex. 306 (1887), (6 S. W. Rep. 834); *Gulf, etc. R. Co. v. Morris*, 67 Tex. 692 (1887), (4 S. W. Rep. 156).

As to legislative ratification of unauthorized sale of a railroad, see *Wood v. Macon, etc. R. Co.*, 68 Ga. 539 (1882).

² *Branch v. Jesup*, 106 U. S. 468 (1882), (1 Sup. Ct. Rep. 495, 9 Am. & Eng. R. Cas. 215).

act, but because they are essential to the fulfilment of those purposes; and it would be a dereliction of the duty owed by the corporation to the State and to the public to part with them.”¹

Questions as to what constitutes indispensable, and what surplus, property are considered elsewhere.²

§ 144. **Seller must have Authority to sell and Buyer to buy.**—From the principle that legislative authority is as necessary to accept a conveyance of franchises as it is to make a grant,³ it follows that both vendor and vendee corporation must be authorized by statute to enter into a contract for the purchase and sale of a railroad.⁴ As said by the Supreme Court of Texas in *East Line, etc. R. Co. v. State*⁵: “To authorize such a transaction it must appear that one corporation had power to sell and the other to buy.”

Authority granted to one railroad company to purchase the railroad and franchises of a specified corporation gives the latter authority to sell.⁶

§ 145. **What Railroads may be the Subject of Sale. Statutory Provisions.**—Statutes of the different States authorizing sales of railroads are collected in the subjoined note.⁷

¹ Statutes authorizing quasi-public corporations to sell their franchises and property are within the constitutional powers of the legislature. Having power to create the corporation, it has power to authorize the transfer of its franchises and assets. See *Claw v. Van Loan*, 4 Hun (N. Y.), 184 (1875).

² See *ante*, § 128: “*Test of Indispensability*”; *ante*, § 129: “*Sales of Surplus Property*.” Also *post*, § 172: “*Leases of Surplus Property*.”

³ *Ante*, § 139: “*Legislative Authority essential to Purchase of Franchises*.”

⁴ *East Line, etc. R. Co. v. State*, 75 Tex. 434 (1889), (12 S. W. Rep. 690); *East Line, etc. R. Co. v. Rushing*, 69 Tex. 306 (1887), (6 S. W. Rep. 834).

A railroad company cannot transfer its franchises to a private person so as to enable him to build a railroad and operate it for his own benefit.

Stewart's Appeal, 56 Pa. St. 413

(1867); *Fanning v. Osborne*, 102 N. Y. 441 (1886), (7 N. E. Rep. 307).

⁵ *East Line, etc. R. Co. v. State*, 75 Tex. 434 (1889), (12 S. W. Rep. 690).

⁶ *New York, etc. R. Co. v. New York, etc. R. Co.*, 52 Conn. 274 (1884).

⁷ *Alabama*. Code 1896 (as amended by Laws 1898-1899), § 1169: “Whenever all of the capital stock of a railroad corporation, chartered under the laws of this State, is owned by a railroad corporation chartered by the laws of another State,” the domestic corporation “may sell and convey to the corporation owning its stock all of its property,” franchises, etc.

Ib. Foreign railroad corporations operating domestic railroad may purchase or lease any other domestic railroad connecting with its own.

Ib. § 1170: “Any railroad corporation . . . of this or any other State, may lease or purchase any part or all

In nearly all of these statutes the power to sell or purchase is granted in connection with the grant of power to lease or take a lease.

of any railroad constructed by another corporation . . . if the lines of such roads are continuous or connected."

Ib. § 1172: "A corporation . . . has authority, for the purpose of extending its line, or forming a connection, to acquire, hold and operate a railroad without the State."

Arizona. R. S. 1901, par. 864, § 1: "Any railroad company . . . may purchase or lease the railroad" franchises, etc., "of any railroad company of this Territory or any other Territory or State. . . . No purchase or lease" shall be made "unless the line of railroad so purchased or leased . . . shall, when constructed, form . . . a branch of, or a continuous line with, the railroad of such purchasing or leasing company either by direct connection therewith, or through an intermediate line or lines."

Ib. Any railroad company may sell or lease its railroad, franchises, etc., to any railroad company, organized under the laws of Arizona, or of any other Territory or State. The lines must be continuous, either directly, or by means of intermediate line or lines.

Arkansas. San. & Hill's Dig. 1894, § 6321: "Any railroad company of this State . . . may sell or lease its road, property and franchises to any other railroad company . . . of any other State . . . whose line of railroad shall so connect with the leased or purchased road by bridge, ferry or otherwise, as to practically form a continuous line of railroad; and any railroad of this State may buy or lease, or otherwise acquire, any railroad or railroads, with all property, . . . whenever the roads shall form, in the operation thereof, a continuous line or lines."

Ib. § 6322: "Any railroad company . . . of any other State . . . may buy, lease, or otherwise acquire any railroad or railroads, the whole or part of which

is in this State . . . whenever the roads of such companies shall form in the operation thereof a continuous line or lines."

Ib. § 6328: "Any railroad company . . . of this or any other State, or of the United States, may lease or purchase all, or any part, of a railroad . . . the whole or part of which is in this State, and constructed, owned or leased by any other company, or connected at any point either within or without this State."

Ib. § 6338: "Every railroad corporation . . . of this State . . . is authorized to sell, lease or otherwise dispose of . . . its road," etc., "to any connecting railroad company, or to any railroad corporation . . . of this or any other State."

Ib. § 6342: "Any railroad incorporated by . . . any other State may, for the purpose of continuing its line through this State, lease or purchase the property . . . of any railroad . . . of this State."

California. Pomeroy's Code, 1901, § 494: "Any railroad corporation owning a railroad in this State may sell, convey and transfer its property and franchises . . . to any other railroad corporation . . . of this or any other State or Territory, or [organized] under any act of Congress, and any other such railroad corporation receiving such conveyance may hold and operate."

"This section does not authorize any corporation to purchase any railroad property operated in competition with it."

Colorado. Mill's Anno. Stat., 1891 (as amended by Sess. Laws 1899, p. 162-163), § 611: "Any railroad corporation . . . of this State, or . . . of an adjoining State or Territory, may lease or purchase any part or all of a railroad constructed by another company within or without this State, if the lines of

As a general rule a railroad company, in these statutes, is expressly authorized to sell its railroad, property and fran-

roads of such companies are continuous or connected."

Sess. Laws 1899, ch. 125, p. 313: "Any railroad company, owning or operating a line of railroad in this State, may purchase other lines of railroad, within or without this State, which shall connect with the road operated by such company, directly, or by means of any other line which such company shall have the right, by contract or otherwise, when constructed, to use and operate."

Ib. "Any corporation . . . of this State may sell its line of railroad to any other company, to which, under the laws of this State it may lease the same or with which it may consolidate."

Florida. R. S. 1891, § 2248: "Any railroad . . . in this State shall have power . . . to make and enter into contracts with any railroad . . . which has constructed or will hereafter construct any railroad . . . within this State or in another State, as will enable said companies to run their roads in connection with each other, . . . or to lease and purchase the stock and property of any other company, and hold, use, and occupy the same in such manner as they shall deem most beneficial to their interests."

Georgia. Code, 1895, § 2179: "Any railroad company incorporated under . . . this article shall have authority to sell, lease, or transfer its . . . property or franchises to . . . any other railroad company incorporated under the laws of this or any other State or of the United States, whose railroad, within or without this State, shall connect with or form a continuous line with the railroad of the company incorporated under this law. Conversely, any such corporation organized under the provisions of this article may purchase . . . the property and franchises of any other railroad company . . . of this or any other State or of the United States whose railroads within or without this State

shall connect with or form a continuous line or system with the railroad of such company incorporated under this law."

Ib. § 2173: "A railroad company shall have power . . . to lease or purchase the property of any other such company [one whose road connects with that of purchasing or leasing corporation] and hold, use and occupy the same in such manner as they shall deem most beneficial."

Idaho. Laws 1901, p. 214: "Any railroad corporation whose line is wholly or in part within this State, whether . . . organized under the laws of this State or of any other State or Territory or of the United States, may lease or purchase . . . the whole or any part of the railroad of any other railroad corporation. . . . Any railroad company may sell or lease the whole or any part of its railroads . . . to any railroad company . . . of the United States or of this State or of any other State or Territory of the United States."

Illinois. R. S. 1901, § 196, p. 1410: Domestic railroad corporations operating foreign or domestic railroads may purchase same. No parallel or competing lines can purchase one another.

Ib. § 218, p. 1415: "Whenever a corporation . . . of another State shall be in possession of a railroad, . . . the whole or a part of which is situated in this State, belonging to a corporation . . . of this State, or shall own or control all the capital stock of such corporation of this State, then the corporation of this State may sell and convey, and such other corporation of another State . . . may purchase in fee simple all the railroad of the corporation in this State."

See also *ib.* § 47, p. 1377.

Indiana. Burn's Anno. Stat. 1901, § 5215: "Any railroad company, incorporated under the provisions of this act, shall have the power and authority to acquire, by purchase or contract, the

chises; but in some cases the power is confined to the sale of the railroad, in whole or part.

road . . . and franchises of any other railroad corporation or corporations which may cross or intersect the line of such railroad company, or any part of the same, or the use and enjoyment, in whole or in part," may also purchase or contract for the use and enjoyment thereof, in whole or in part, of any railroads lying within adjoining States . . . [This act does not authorize] "any railroad company organizing under the same to . . . acquire . . . the road . . . [or] franchises of any railroad already built, equipped and operated within the State of Indiana and which may cross and intersect the line of railroads organizing under this act; but the powers . . . are . . . limited . . . to such roads within the State . . . as may cross or intersect the same and which have not been equipped and operated in whole or in part."

Iowa. Code 1897, § 2066: "Any railroad corporation may sell or lease its property and franchises to . . . any corporation owning or operating any connecting railway."

Kansas. G. S. 1897, ch. 70, § 95: "Any railroad company of this State may sell or lease . . . its railroad and branches . . . to any railroad company . . . of this State or of any other State or Territory of the United States. . . . No purchase . . . shall be entered into unless the line of railroad so purchased . . . shall . . . form a continuous line with the road of the company purchasing . . . either by direct connection therewith, or through an intermediate line or lines."

Ib. § 51: Domestic corporations may extend their lines into other States and purchase or lease lines of railroad in such States, provided that such lines are connected, forming a continuous line.

Maine. Laws 1899, ch. 1, § 54: No corporation can assign its charter or any right under it; lease or grant the use or control of its road, or any part of it, without the consent of the legislature.

Maryland. P. G. L. 1888, Art. 23, § 191: "Any railroad company incorporated under . . . [particular statutes] shall also have power to purchase or contract for the use and enjoyment, in whole or in part, of any other railroad or railroads lying within or without this State, if the same shall connect with or form a continuous line with the railroad of the company incorporated under said sections."

Michigan. Pub. Acts 1901, Act No. 30, p. 50: "Any railroad company . . . of this State" is authorized to "sell, lease, and convey its road . . . rights and franchises . . . to any other railroad company, whether organized within or without this State; and to acquire, by lease or purchase, from the owner of any other railroad such road . . . whether located within or without this State; and . . . the railroad company so purchasing or leasing" may "acquire and use such road, rights and franchises by purchase of stock, or otherwise, . . . said railroads not having the same terminal points and not being competing lines."

Comp. Laws 1897, § 6328: Domestic railroad company being unable to complete its road, may sell to any domestic corporation not owning a competing line.

Pub. Acts 1899, No. 266, § 17, p. 447: Miscellaneous provisions as to sale of unfinished railroads.

Minnesota. Laws 1899, ch. 229, p. 253: "Any railroad corporation, either domestic or foreign . . . may lease or purchase or in any way become the owner of, or control or hold the stock of any other railroad corporation when their respective railroads can be lawfully connected and operated together so as to constitute one continuous main line . . . and in case such lease or purchase shall be made by a foreign corporation" such corporation shall have the same rights as the vendor company.

G. S. 1894, § 2721: "Any railroad

In all cases the purchaser must be a railroad company, but, generally, no distinction is made between domestic and foreign corporations as purchasers.

corporation may . . . purchase or lease any railroad constructed by any other corporation whose lines of roads are continuous or connected with its own."

Missouri. R. S. 1899, § 1060: A railroad company may aid other railroad companies by purchase and "any railroad company . . . of this or any other State or of the United States may lease or purchase all or any part of a railroad with all its privileges, rights, franchises, real estate and other property, the whole or part of which is in this State, if the lines of road or roads of such companies are continuous or connected at a point, either within or without this State, upon such terms as may be agreed between the companies respectively."

Ib. § 1061: "Any railroad company . . . of this State . . . may acquire any line of railroad within or without this State which shall form a continuous line with the road operated by such company, by direct connection or over any other line or lines . . . which such company shall have the right, by contract or otherwise . . . to use and operate."

Montana. Code 1895, § 912: "Any railroad corporation whose line is wholly or partly within this State, or reaches the boundary line thereof, whether . . . of the State or Territory of Montana, or of the United States, or of any other State or Territory, may lease or purchase the whole or any part of the railroad or line of railroad of any railroad corporation. . . . The railroad or line of railroad so leased or purchased" must be "continuous of or connected with its own line."

Ib. § 923: "Any company . . . within this State may . . . buy or lease any railroad or railroads in any other State or Territory, or . . . any other railroad in this State . . . ; or any railroad company may sell or lease the whole or any part of its railroad or

branches within this State . . . to any railroad company . . . of the United States, or of this State or of any other State or Territory of the United States."

Nebraska. Comp. Stat. 1901, § 4024: "Every railroad company . . . of this State whose railroads . . . within this State shall be so situated with reference to any railroad constructed through any adjoining State or Territory by any railroad company . . . of the United States, or any State or Territory, that the same may be so connected at the boundary line of this State or at any point within this State, by bridge, ferry, or otherwise, as to practically form a continuous line of railway over which cars may pass, is hereby authorized to purchase such connecting railway, or to sell the same to the railroad company" that owns or operates, etc., said railroad through the adjoining State, to said point of connection.

Ib. § 1769: "Any railroad company, existing in pursuance of law, may lease or purchase . . . any railroad . . . if said companies' lines of railroad . . . are continuous or connected."

See also *ib.* §§ 4018, 4019, 4026.

Nevada. Laws 1901, p. 51: "Any railroad corporation owning any railroad in this State may sell . . . its property . . . to any other railroad corporation . . . of this State or of any other State or Territory; or under any act of Congress."

New Jersey. Laws 1900, ch. 46, p. 70: "Whenever any railroad corporation of this State shall own all the bonds and shares of stock of any other railroad corporation of this State whose railroad . . . connects with the railroad of said first mentioned corporation" it may acquire, have, hold, use, etc., all the rights, etc., of the corporations so controlled.

New Mexico. Comp. Laws 1897, § 3891: "Any railroad organized in

The right to purchase and sell is usually limited to corporations owning connecting or continuous lines of road. The

pursuance of law either within this or any other Territory, or State, may lease or purchase any part or all of any railroad constructed, owned, or leased by any other company."

New York. R. S. 1901 (Birdseye's) Railroad Law, § 79: "Any corporation . . . of this State, or its successors, being the lessee of any other railroad corporation may take a surrender of the capital stock of the stockholders or any of them in the corporation whose road is held under lease." The lessee corporation may issue in exchange therefor its own stock at par. When the greater part of the capital stock of the lessor corporation is so acquired the directors of the lessee corporation become *ex officio* directors of the lessor corporation, and when the whole of the capital stock is acquired and a certificate thereof filed with the Secretary of State, the estate, property, franchises, etc., of the lessor corporation vest in the lessee corporation and may be managed and controlled by its directors. Rights of creditors and existing liabilities of the lessor corporation are not affected by the transfer.

North Dakota. Rev. Codes 1899, § 2954: "Any such railroad corporation [of this State or Territory of Dakota or existing by consolidation of railways of such State or Territory and of any other Territory or State] may lease or purchase and take by conveyance or assignment the railroad franchises . . . of any other railroad corporation, or any portion thereof within or without this State, when their respective railroads can be lawfully connected and operated together to constitute one continuous main line, or when the roads so purchased will constitute branches or feeders of any road maintained and operated by such purchasing corporation."

Ohio. Bates' Anno. Stat. 1787-1902, § 3300: "Any company may lease or purchase any part or all of a railroad

constructed or in the course of construction by another company, if the lines of road of such companies are continuous or connected . . . upon such terms as may be agreed upon by the companies."

Ib. § 3409. A railroad company unable to complete its road may sell to any domestic railroad company authorized to operate over the same route.

See also *ib.* § 3392 (1).

Oklahoma. Stat. 1893, ch. 17, § 15, par. 1016: "Any railroad corporation whose line is wholly or in part within this Territory, whether . . . of this Territory, or of any other State or Territory, or of the United States, may lease or purchase and operate the . . . railroad of any other railroad corporation . . . when such railroads can be lawfully connected and operated together so as to constitute a continuous main or branch line."

See also Sess. Laws 1901, Art. 4, ch. 11, p. 86.

Oregon. Hills' Anno. Laws 1892, ch. 32, § 3221, subdiv. 7: Railroad companies have power "to lease or purchase, maintain and operate any part or all of any other railroad constructed by any other company upon such terms and conditions as may be agreed upon between said companies respectively."

No parallel or competing lines are authorized to lease or purchase.

Pennsylvania. Laws, 1901, Act No. 20, p. 53: "It shall be lawful for any railroad corporation of this commonwealth, having a railroad connecting with that of any other like corporation, and owning at least two-thirds of the capital stock of the latter, to acquire in the manner hereinafter provided, and thereafter be possessed of, own, hold, exercise and enjoy, all the franchises, corporate property, rights and credits then possessed, owned, held or exercised, by said last-mentioned vendor corporation."

South Carolina. R. S. 1893, § 1624:

considerations of public policy inducing this limitation have already been considered in connection with similar provisions in consolidation statutes.¹

"Railroad companies . . . of this State . . . may . . . enter into contracts for the purchase, use or lease of other railroads . . . and may run, use and operate such road or roads in accordance with such contract or lease: Provided that the roads of the companies so contracting or leasing shall be directly, or by means of intervening railroads, connected with each other."

Ib. § 1542: "Every railroad company incorporated in this State shall have all the rights, powers . . . set forth in this article."

Ib. § 1546: "Such company shall have the power and authority . . . to purchase, lease, . . . any other railroad or railroads in or out of this State, in such manner and upon such terms as may be agreed between such railroad companies."

South Dakota. Anno. Stat. 1901, § 3906: "Any railroad company may sell or lease the whole or any part of its railroad or franchises within this State . . . to any railroad company . . . of the United States, or of this State, or of any other State or Territory of the United States."

Tennessee: Code 1896, § 1509: "Every railroad corporation in this State . . . shall have the power to" buy "any railroad . . . belonging to any other railroad corporation."

Ib. § 1521: "Any and all railroad companies . . . of this State, or of this State and any other State or States, whose charters of incorporation were or may be granted by this State," may "acquire the line or lines of any other railroad company either in this State or any other State or States, which may connect with or form parts and parcels or branches or extensions of the line of such company chartered by this State" and may "so acquire branches or extensions by purchase, lease or otherwise."

Ib. § 1540: "Railroad companies of this State" may "lease or let, acquire by purchase, lease or otherwise . . . any railroad or railroads in any State or States, or any parts or portions of any such railroads . . . as may be determined upon by the stockholders."

Utah. Laws 1901, ch. 26, p. 21, § 3: "Any corporation owning any railroad line in this State may sell, convey, and transfer its property and franchises . . . to any railroad corporation (not owning any competing line) in this State whether organized under the laws of this State or of any other State or Territory, or of any act of Congress."

Ib. § 4: "Railroad corporations may be formed, pursuant to the laws of this State, for the purpose of buying or leasing a corporation or corporations whose lines of railroad are situated within or without this State, or partly within and partly without this State."

Washington. Ballinger's Anno. Codes and Stat. 1897, § 4304: "Any railroad corporation whose line is wholly or in part within this State, whether chartered by or organized under the laws of this State, or any other State or Territory, or of the United States, may lease or purchase the railroad of any other railroad corporation."

West Virginia. Code 1899 (as amended by Acts 1901, ch. 108), ch. 54, § 53: (1) Same as "consolidation" statute (see *ante*, § 22), substituting "purchase" and "sell" for "consolidate."

Ib. ib. (2): "Any railroad . . . of this State . . . or of this State and other States may purchase the railroad . . . of any railroad company created under the laws of this State, or of this State and any other State or States," provided railroads purchased are not parallel or competing lines with purchaser. And provided further that "the railroad or

¹ See *ante*, § 22: "What Railroads may consolidate — Statutory Provisions."

It will be observed that the New York and New Jersey statutes relate rather to *succession* than to purchase and sale.

§ 146. **Construction of Statutes.** — A railroad company obtains power to sell its railroad and franchises, or to purchase the railroad and franchises of another corporation, only when it is distinctly conferred by statutory authority. Such power will not arise by implication unless necessary to give effect to the language employed in a statute. Any ambiguity in the terms of the grant will operate against the corporation claiming the power.¹

In *Wood v. Bedford, etc. R. Co.*² Judge Sharswood said: "The general canon of construction applicable to legislative grants of this class, derogating as they do from common right and public policy, requires that the intention should be very manifest; if not to be unequivocally expressed, at all events not to depend upon ambiguous phrases rendering the implication doubtful."

Power to purchase does not include power to sell.³ Au-

railroads so . . . purchased form, with the railroad of the company . . . purchasing the same, either directly or by means of other intervening railroad or railroads, a through line for the transportation of persons and property."

Wisconsin. Stat. 1898, § 1833 (as amended by Laws 1899, ch. 191): "Any such railroad corporation [see *ante*, § 22, "consolidation"], may give or take a lease or may sell to, or purchase from, any railroad company . . . within or without the State, and give or take a conveyance of the railroad franchises . . . of any railroad corporation . . . of this State, or of any other State, or of the United States, or any portion thereof, within or without the State, when their respective railroads can be lawfully connected and operated together to constitute one continuous main line, or when the road so purchased or leased will constitute a branch . . . or be connected or intersected by, any line maintained and operated by such purchasing or leasing corporation, or which such purchasing or leasing corporation is

authorized to build, own, maintain or operate."

Wyoming. R. S. 1899, § 3206: "Any company owning or operating a railroad within this State may extend the same into any other State or Territory, and may . . . buy, lease or consolidate with any railroad or railroads in such other State or Territory, or with any other railroad in this State, and may operate the same. . . . Any railroad may sell or lease its railroad or branches within this State . . . to any railroad company . . . of the United States, or of this State, or of any other State or Territory of the United States."

¹ *Black v. Delaware, etc. Canal Co.*, 24 N. J. Eq. 455 (1873). Compare decision of the Chancellor in the same case, 22 N. J. Eq. 130 (1871).

² *Wood v. Bedford, etc. R. Co.*, 8 Phila. (Pa.) 95 (1871).

³ *Southern Pac. R. Co. v. Esquibel*, 5 N. Mex. 123 (1889), (20 Pac. Rep. 109). Whether power to consolidate includes power to sell see *ante*, § 28:

thority to sell is not implied from a grant of authority to mortgage.¹ Authority granted to one railroad company to "purchase, lease, hold and maintain any other railroad" does not confer upon other railroad companies implied authority to sell.² Authority to purchase the railroad of a specified corporation, however, empowers the latter corporation to make the sale.³ Power to sell a constructed railroad does not authorize the sale of road before it is finished;⁴ nor can a transfer of franchises be justified under a statute permitting the lease of a completed railroad.⁵ Power to sell or purchase will not be implied, in favor of a non-competing railroad, from a statute prohibiting the execution of a contract of sale between competing roads.⁶

"Power to buy a railroad cannot be implied from an express grant of power to 'construct, own, maintain and operate' a railroad to be constructed by the corporation to which those express powers are given, for the existence of such a power is not necessary to accomplish the object specified."⁷ A grant of power to a railroad company to locate and construct branches to its main road does not include authority to purchase the railroad of another company constructed under a different charter.⁸

Where, however, the sale of a railroad and franchises is distinctly authorized by statute a sale may be effected although, thereby, the objects for which the corporation was created are defeated.⁹ Authority "to have, purchase, possess, enjoy

"Construction of Particular Statutory Provisions."

¹ *Southern Pac. R. Co. v. Esquibel*, 5 N. Mex. 123 (1889), (20 Pac. Rep. 109). "It was argued for the appellant that, if the land could be mortgaged for the means to construct, equip, and operate the road, it could be assigned, in the first place, for the same object. The doctrine that a power to mortgage includes a power to sell is not supported by authority of law."

² *State v. Consolidation Coal Co.*, 46 Md. 1 (1876).

³ *New York, etc. R. Co. v. New York, etc. R. Co.*, 52 Conn. 274 (1884).

⁴ *Clarke v. Omaha, etc. R. Co.*, 4 Neb. 458 (1876).

⁵ *Pittsburgh, etc. R. Co. v. Bedford, etc. R. Co.*, 81½ Pa. St. 104 (1871); *Wood v. Bedford, etc. R. Co.*, 8 Phila. (Pa.) 94 (1871).

⁶ *East Line, etc. R. Co., v. State*, 75 Tex. 434 (1889), (12 S. W. Rep. 690).

⁷ *East Line, etc. R. Co. v. Rushing*, 67 Tex. 692 (1887), (4 S. W. Rep. 156).

⁸ *Campbell v. Marietta, etc. R. Co.*, 23 Ohio St. 168 (1872).

⁹ *Mahaska County R. Co. v. Des Moines, etc. R. Co.*, 28 Iowa, 437 (1870).

and retain lands, rents, hereditaments, goods, chattels and effects, of whatsoever kind, nature or quality" sanctions the purchase of a railroad.¹ A statute authorizing "any railroad company" to purchase the railroad and franchises of a particular corporation authorizes such purchase by a railroad company of another State.²

§ 147. **Constitutional and Statutory Prohibitions of Purchase of Competing or Parallel Lines.** — The purchase by a railroad company of a line of railroad competing with, or parallel to, its own is prohibited in many constitutional and statutory provisions, in connection with similar prohibitions against consolidations and leases. These provisions, their construction and application, have already been fully considered.³

III. *Authorization and Execution of Contract of Sale.*

§ 148. **Statutory Requisites.** — The statutes of the different States prescribing the method to be followed in authorizing and executing sales of railroads are referred to in the footnote.⁴

¹ *Branch v. Atlantic, etc. R. Co.*, 3 Woods (U. S.), 481 (1879).

For construction of particular statutory and constitutional provisions relating to sales of railroads and franchises see *Mackintosh v. Flint, etc. R. Co.*, 34 Fed. 582 (1888); *Venner v. Atchison, etc. R. Co.*, 28 Fed. 581 (1886); *People v. Stanford*, 77 Cal. 360 (1888), (18 Pac. Rep. 85); *Barley v. Southern R. Co.*, 61 S. W. Rep. 31 (1901).

² *Boston, etc. R. Co. v. Boston, etc. R. Co.*, 65 N. H. 397 (1888), (23 Atl. Rep. 529). Chief Justice Doe said: "Express consent is given to a purchase by 'any railroad company.' Taken without qualification this clause includes foreign as well as domestic railroad corporations. The words 'any railroad company' might be used in a connection and for a purpose that would show a restricted sense not including foreign companies. Here is no evidence to exclude them."

³ See *ante*, ch. 3: "*Constitutional and Statutory Restraints upon Consolidation.*"

⁴ *Arizona*. R. S. 1901, par. 864, § 1: Assent of holders of two-thirds of entire corporate stock — by vote or in writing — necessary to contract of sale.

Alabama. Code 1896, §§ 1170, 1173: Approval of holders of majority in value of stock of vendor and vendee corporations at meeting called for the purpose required.

Arkansas. San. & Hill's Dig. 1894, §§ 6321, 6328, 6332, 6338: Assent of holders of two-thirds of capital stock is necessary.

California. Pomeroy's Code 1901, § 494: Contract of sale must be authorized by directors and ratified by three-fourths of stockholders of both corporations.

Colorado. Mills' Anno. Dig. 1891, § 612. Also Sess. Laws 1899, ch. 125, p. 313: Assent of holders of two-thirds

The State may withhold the grant of power to sell entirely or may attach such conditions to its exercise as it may deem expedient. These conditions — as distinguished from mere directions — must be strictly complied with. They are conditions precedent to the validity of the sale.

As a general rule, these statutes prescribe three steps in the authorization and execution of a contract of sale :

of capital stock of each company required.

Illinois. R. S. 1901, §§ 196, 218: Approval of holders of two-thirds of capital stock required.

Kansas. G. S. 1897, § 95: Sale must be ratified by vote of two-thirds of capital stock of each company, or approved by such holders in writing.

Michigan. Comp. Laws 1897, § 6328: Consent of two-thirds of stockholders required for sale of uncompleted road. Consent of majority sufficient under 1901 Act (P. A. 1901, Act No. 30, p. 50).

Minnesota. G. S. 1894, §§ 2721, 2736: Sale must be approved by holders of two-thirds of capital stock of each company at meetings called for the purpose.

Missouri. R. S. 1899, § 1060: Holders of a majority of stock of each company must assent in writing to sale proposed by directors before it can be perfected.

Montana. Code 1895, § 912, requires approval of three-fifths of stockholders. *Ib.* § 923 requires approval by majority vote or by majority in writing. Apply to sales under different statutes.

Nebraska. Comp. Stat. 1901, § 1769: Sale must be assented to by vote of holders of two-thirds of capital stock; (§ 4026) by vote or written approval of like number. *Ib.* §§ 4018, 4019, authorize approval of certain sales by majority vote.

New Jersey. Laws 1900, ch. 46, p. 70: Acquisition effected by written agreement executed pursuant to resolution adopted by directors of each company.

New Mexico. Comp. Laws 1897, § 3891: Holders of two-thirds of capital stock must assent to sale.

North Dakota. Rev. Codes 1899, § 2954: Sale must be approved in same manner as consolidation. See *ante*, § 52: "*Formal Statutory Requisites*" (consolidation).

Ohio. Bates' Anno. Stat. 1787-1902, §§ 3301, 3411: Two-thirds of stockholders must approve sale at meeting called by each corporation.

Pennsylvania. Laws 1901, p. 52, Act No. 20: Agreement adopted by directors must be approved by majority of stockholders of each corporation present at meeting called for the purpose.

South Dakota. Anno. Stat. 1901, § 3906: Sale must be approved in same manner as consolidation. See *ante*, § 52: "*Formal Statutory Requisites*" (consolidation).

Tennessee. Code 1896, § 1540: Sale must be approved by votes of holders of three-fourths of capital stock.

West Virginia. Code 1899, ch. 54, § 53: Sale under first part of statute requires approval of majority of stockholders; under second part two-thirds. Also refers to consolidation statute. See *ante*, § 52, "*Formal Statutory Requisites*" (consolidation).

Wyoming. R. S. 1899, § 3206: Sale must be approved by vote of holders of a majority of stock, or their written approval must be given.

All the above abstracts should be examined in connection with the statutes collected in note to *ante*, § 145: "*What Railroads may be the Subject of Sale. Statutory Provisions.*"

1. The contract must be approved by the boards of directors of both vendor and vendee companies.

2. It must be submitted to and approved by the prescribed majority of the stockholders of each company.

3. It must be formally executed in behalf of each corporation by agents appointed for the purpose.

§ 149. **Assent of Stockholders. Whether Approval of Majority is sufficient.** — As shown in the last section, statutes authorizing sales of railroads generally prescribe the number of stockholders whose consent is necessary.

Where, however, the statute merely grants power to sell, questions may arise as to the manner of exercising the power.

It may be contended that the grant of authority to sell only waives the rights of the public,¹ and, therefore, that a railroad company — a *quasi*-public corporation — with power to sell, stands in the position of a private corporation with respect to the disposition of its property — that whether unanimous consent is necessary to a sale of a railroad and franchises, where

¹ *Knoxville v. Knoxville, etc. R. Co.*, 22 Fed. 763 (1884): "The authority thus given to any railroad company to buy necessarily implies authority to other companies to sell, inasmuch as there could be no purchase without corresponding sale. But it was not competent for the legislature to do more in this respect than to waive the public rights. It could not divest or impair the rights of the shareholders, as between themselves, as guaranteed by the company's charter, without their consent. It was upon the faith of the stipulations contained in said charter that the shareholders subscribed to the capital stock, and thereby made themselves members of the corporation. These stipulations, as we have already seen, contemplated and provided for the construction of a railroad between the *termini* named, to be governed by the shareholders, in the manner and upon the terms prescribed. Each corporator is entitled to have the contract fairly

interpreted and honestly enforced. The charter invests the owners of a majority of the capital stock with the right to control the corporate business within the scope of its provisions. Within this limit, the power of the majority, when acting in good faith, is supreme. But complainant's charter does not, by any reasonable intendment, clothe the majority with authority to sell the company's franchise and property, and in this way coerce the minority and protesting shareholders into another and different corporation, owning and operating another and different railroad, under another and different charter imposing other and different obligations, and governed by a different set of operators. To so hold would be to divest them of their vested rights and force them into relations and subject them to duties and obligations which they have not, and probably would not, have voluntarily assumed."

the governing statute is silent, depends upon the principles of law, already considered, applicable to private corporations.¹

Upon principle, however, it seems the better view that authority granted a railroad company to sell its road and franchises is an express power of the corporation; and that it may be exercised, unless otherwise provided, in the same manner that other primary corporate powers are exercised — by a majority vote of the stockholders.²

Unquestionably, the assent of at least a majority of the stockholders is essential. Unless the power is distinctly conferred by statute or by laws upon the directors — they have no authority to sell the railroad or franchises of their corporation, in whole or in part.³ Directors are appointed to manage the affairs of a corporation, and not to transfer its property to others.

§ 150. **Acquiescence of Stockholders.** — The assent of the stockholders of a railroad company to the purchase or sale of a railroad should, regularly, be expressed in the manner provided in the statute authorizing the sale; and, in the absence of other statutory provision, by their votes at stockholders' meeting. Acquiescence, however, is an implied sanction of a sale.⁴ Stockholders who stand by and take no action until the rights of third persons intervene lose their right to question sales of railroads made without their approval.⁵ Stock-

¹ See *ante*, ch. 11, subdiv. 1: "*Sales of Property of Private Corporations.*"

² See *post*, § 189: "*Whether Unanimous Consent is necessary unless otherwise provided.*"

³ See *ante*, § 112: "*Sale of Entire Corporate Property by Directors.*"

In *Martin v. Continental Passenger R. Co.*, 14 Phila. (Pa.) 10 (1880), the Court said: "Boards of managers are simply the agents of the corporation which, like natural persons, is bound only by the acts and contracts of its agents, done within the scope of their authority. The business of the directors of a railway is to manage the business intrusted to their charge. To give it away or sell it, or in any way put it out of their control, and to delegate to

others the power which has been intrusted to them, is clearly in excess of their authority."

⁴ *Boston, etc. R. Co. v. New York, etc. R. Co.*, 13 R. I. 260 (1881). See also *ante*, § 45: "*Assent of Stockholders, how manifested. Acquiescence. Estoppel.*" Also *ante*, § 116: "*Defences to Stockholders' Actions. Estoppel.*"

⁵ *Dimpfel v. Ohio, etc. R. Co.*, 9 Biss. (U S.) 127 (1879), (*affirmed* 110 U. S. 209 (1884)): "In the second place, even if the right did not clearly exist by virtue of the laws of Illinois, after the lapse of so long a time, and after so many rights and equities have been acquired by different parties under the action of the railway company, it is not competent for the plaintiff, or the other

holders who participate in the transaction cannot, after its consummation, question its validity, although their formal votes were lacking.¹

§ 151. *Rights and Remedies of Dissenting Stockholders.* — It is well settled that equity will restrain, at the instance of a single stockholder, a majority of the stockholders of a corporation, acting in its name, from entering into *ultra vires* or unlawful contracts. Minority stockholders, acting with due diligence, may sue for an injunction against the unauthorized sale of a railroad before its consummation, and for the cancellation of the contract after its execution.²

A distinction has been drawn between the right of a dissentient stockholder to restrain an act *ultra vires* the corporation and an act *ultra vires* the majority. Thus, it has been declared that while a stockholder might have an unauthorized sale of a railroad declared illegal no relief could be granted where the prescribed majority sanctioned the sale, although made for stock in the purchasing corporation. Judge Jackson, in *Farmers Loan, etc. Co. v. Toledo, etc. R. Co.*,³ said: "The sale, being sanctioned by the requisite majority of stockholders, and made by the corporation, as provided and authorized by the general law of the State under which the company was organized, invested the purchasing company with as perfect a title to the property and franchises as was vested in or held by the vendor corporation, and operated to make the purchasing corporation the legal successor of the

stockholders of the Ohio and Mississippi Railway Company, any more than for the company itself to question the authority under which the contract and mortgage were executed. The only power that could do that was the State itself."

¹ Where the charter of a railroad company authorized it to purchase railroads which might form a continuation of its main line; and where such purchase had been fully executed, and where its validity had never been questioned in a direct proceeding, it was held the parties to such purchase — those who acquiesced in it, and those

who failed in due time, by some proper proceeding, to question its validity — were estopped to raise any question. *Hervey v. Illinois Midland Ry. Co.*, 28 Fed. 169 (1884).

² See *ante*, § 46: "*Rights and Remedies of Dissenting Stockholders*" (consolidation); *ante*, § 114: "*Remedies of Dissenting Stockholders*" (sales of property).

³ *Farmers Loan, etc. Co. v. Toledo, etc. R. Co.*, 54 Fed. 767 (1893). See also *Young v. Toledo, etc. R. Co.*, 76 Mich. 485 (1889), (43 N. W. Rep. 632) — another case arising out of the same transactions.

vendor corporation. It would be paradoxical to hold that such a sale was valid as to the corporation, and invalid as to one of its stockholders who objected thereto, and whose assent was not necessary to give validity to the transaction. It would be equally inconsistent to hold that such a sale, made under and in pursuance of statutory authority in force at the organization of the corporation and at the date of the transaction, should be treated as only binding upon the corporation and the stockholders assenting thereto, and invalid as to a dissenting shareholder whose consent was not a prerequisite to its validity."

The distinction is not well taken. The decision assumes too much.¹ A sale authorized by the requisite majority of the stockholders, according to the statute, does bind the minority. But an exchange of property for stock is not a sale. The prescribed majority have no more power, under a statute authorizing a sale, to make an exchange, than they have to make a donation. A transfer of property for stock *may be ultra vires* of the corporation. It is *ultra vires* of the majority, and may be restrained at the suit of any stockholder.²

¹ In the case referred to (*Farmers Loan, etc. Co. v. Toledo, etc. R. Co.*, 54 Fed. 775 (1893)), Judge Taft said: "Under the statute of Michigan permitting the sale of an uncompleted railroad by its stockholders to another road, the words of which are quoted in the foregoing opinion, there is no power in two-thirds in interest of the stockholders to bind one-third to a sale for any consideration but money or money credit. We have already held in this court, in the case of *Perin v. Megibben*, 53 Fed. Rep. 86 (1892), that a statutory power to sell does not include a power to exchange for shares of stock in a corporation. Nor do I understand the Supreme Court of Michigan to hold, in the case of *Young v. Railroad Co.*, 76 Mich. 485 (1889), (43 N. W. Rep. 632), that it is within the power of two-thirds of the stockholders, under this statute, to bind a minority to a sale for anything but money."

Judge Hammond said (p. 778): "I do not think that any corporation can go out of business, and sell its properties and franchises in entirety (outside of sales made in the ordinary course of business), and bind a minority of the stockholders, by the will of the majority, to such a sale, upon any principle of the public welfare or like consideration; certainly, not to compel the minority, on such a sale, to take chips and whetstones for their shares of stock,—that is to say, anything else than money."

The decision in the case, however, finally turned upon other grounds.

² Judge Taft also said, following the extract from his opinion in the last note: "There is no doubt whatever of the proposition urged in the foregoing opinion,—that a minority stockholder is bound by the acts of the majority so long as that majority acts within its charter powers,—nor is there any doubt

CHAPTER XIV.

EFFECT OF EXECUTION OF CONTRACT OF SALE.

I. *Rights and Liabilities of Vendor Corporation.*

- § 152. Sale of Railroad and Franchises does not terminate Corporate Existence.
- § 153. Rights of Vendor Corporation after Authorized Sale.
- § 154. Liabilities of Vendor Corporation in Case of Authorized Sale.
- § 155. Liabilities of Vendor Corporation in Case of Unauthorized Sale.
- § 156. *Quo Warranto* and other Proceedings against Vendor Corporation.

II. *Rights and Liabilities of Vendee Corporation.*

- § 157. Essential Franchises pass upon Sale of Railroad.
- § 158. Rights and Powers of Vendee Corporation — In General.
- § 159. Right of Eminent Domain.
- § 160. Exemptions from Taxation.
- § 161. Right to fix Rates of Fare. Chartered Rates.
- § 162. Obligations of Vendee Corporation in Respect of Public Duties of Vendor.
- § 163. Vendee Corporation not liable upon Obligations of Vendor unless assumed or imposed by Law.
- § 164. Status of Foreign Vendee Corporation.

I. *Rights and Liabilities of Vendor Corporation.*

§ 152. **Sale of Railroad and Franchises does not terminate Corporate Existence.** — The sale of all the property of a corporation does not work its dissolution.¹ The sale by a railroad company of its road and franchises, while disabling it from the performance of the functions for which it was cre-

that neither the majority nor the entire body of stockholders of the corporation can do a corporate act which its charter forbids; but there are corporate acts which are not within the charter power of the majority of the stockholders, and yet which are not beyond the power of the corporation. There are acts of the corporation, which the State, as the grantor of the corporate franchise, has no interest to invalidate, provided all the stockholders consent thereto. There are acts which, if done by a majority, only infringe upon the charter rights of the minority. In this case the power to sell for money was conferred by statute

upon two-thirds of the stockholders of the uncompleted road. The sale could not be for stock in another company, against the objection of the minority stockholders. No such power was vested by the statute in the two-thirds majority. If, however, the minority consented, the State, the grantor of the corporate franchise, had no interest in objecting to the transaction as beyond the corporate power of the company." See also *ante*, § 114: "*Remedies of Dissenting Stockholders in Case of Invalid and Unfair Sales.*"

¹ See *ante* § 117: "*Effect of Sale of Entire Corporate Property.*"

ated, does not terminate its corporate existence.¹ Its dissolution can be accomplished only by the surrender, forfeiture or repeal of its charter.

A sale, however, in pursuance of a statute authorizing a railroad company to sell its franchises, including the franchise to be a corporation, is, in effect, a surrender of the charter.² Statutes may also expressly provide that a sale of all its property shall constitute a dissolution of a corporation.³ But, under such a statute, an illegal or fraudulent sale will not effect a dissolution.⁴

§ 153. **Rights of Vendor Corporation after Authorized Sale.** — As the sale of the railroad and franchises of a railroad company does not *ipso facto* terminate its corporate existence, the corporation necessarily retains the formal powers essential to a nominal existence, to the winding up of its affairs and to the performance of its continuing public duties. It also retains any property and rights not included in the deed of conveyance, or of which the statute does not authorize the sale. Thus, for example, it has been held that power to sell a railroad does not authorize the sale of subscriptions to the stock of the vendor company.⁵

¹ *United States*: *United States v. Little Miami, etc. R. Co.*, 1 Fed. 700 (1880); *Swan Land, etc. Co. v. Frank*, 39 Fed. 456 (1889).

Alabama: *Davis v. Memphis, etc. R. Co.*, 87 Ala. 633 (1888), (6 So. Rep. 140).

Connecticut: *Saugutuck Bridge Co. v. Town of Westport*, 39 Conn. 337 (1872).

Delaware: *Higgins v. Downward*, 8 Houst. 227 (1888), (32 Atl. Rep. 133, 40 Am. St. Rep. 141).

Illinois: *Brufett v. Great Western R. Co.*, 25 Ill. 353 (1861); *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439 (1883).

Indiana: *DeCamp v. Alward*, 52 Ind. 468 (1876).

Iowa: *Muscatine Western R. Co. v. Horton*, 38 Iowa, 33 (1873).

Massachusetts: *Richardson v. Sibley*, 11 Allen (Mass.), 67 (1865).

Missouri: *Heath v. Missouri, etc. R. Co.*, 83 Mo. 617 (1884).

New Jersey: *Sewell v. East Cape May Beach Co.*, 50 N. J. Eq. 717 (1892), (25 Atl. Rep. 929).

New York: *Troy, etc. R. Co. v. Kerr*, 17 Barb. 581 (1854).

Texas: *Gulf, etc. R. Co. v. Newell*, 78 Tex. 334 (1889), (11 S. W. Rep. 342), (15 Am. St. Rep. 788).

² *Snell v. City of Chicago*, 133 Ill. 413 (1890), (24 N. E. Rep. 532); *Rogersville, etc. R. Co. v. Kyle*, 9 Lea (Tenn.), 691 (1882); *Reynolds v. Cridge*, 11 Pa. Co. Ct. Rep. 306 (1892).

³ Under *Pennsylvania* statute of 1901 (Laws 1901, p. 53, Act No. 20), upon filing copy of agreement in office of secretary of the Commonwealth, corporate existence of vendor terminates.

⁴ *White Mountains R. Co. v. White Mountains R. Co.*, 50 N. H. 50 (1870).

⁵ *In Railroad Co. v. Hinsdale*, 45

§ 154. **Liabilities of Vendor Corporation in Case of Authorized Sale.** — It has been held that the obligations of a railroad company to the public can only be discharged by a sale of its franchises to another company under a legislative enactment authorizing the sale and *exempting* the vendor from liability; that legislative consent is not sufficient — a legislative release is necessary. Upon this doctrine, the Supreme Court of Nebraska held a vendor corporation, after an authorized sale, liable for the torts of the vendee in the operation of the road.¹

Public policy is declared to be the basis of the doctrine, and it may well be that, unless exempted, a vendor corporation remains liable upon its primary obligations to the State. But when the legislature has authorized a sale, and thereby manifested the policy of the State that the railroad should be owned and operated by the vendee, neither principle nor policy requires that the vendor should be held responsible for the operation of the road of another by persons with whom it has no connection and over whom it can exercise no control.²

Ohio St. 556 (1888), (15 N. E. Rep. 665), where a person subscribed for stock in a railroad company — subscription payable when road was completed — and the company sold its uncompleted road to another corporation which completed the construction, it *was held* that the Ohio statutes (Bates' Anno. Stat. 3300 and 3409) authorizing sales of railroads did not confer authority to sell stock subscriptions; that no ownership in the subscription passed to the purchaser of the railroad, and that such purchaser could not fulfil the condition precedent to the payment of the subscription by completing the road.

Compare *Armstrong v. Karschner*, 47 Ohio St. 276 (1890), (24 N. E. Rep. 897), where it was held that a statute authorizing the sale of a railroad, in force at the time of a stock subscription, becomes a part of the contract of subscription, and that a sale by the company of a part of its road does not release a subscriber. *Compare* also *Hays v. Ottawa, etc. R. Co.*, 61 Ill. 422 (1871).

A sale by a corporation of its property and franchises does not carry with it stock in its treasury which it has bought in and has not re-issued. *Tulare Irr. Dist. v. Kaweah Canal, etc. Co.* (1896, Cal.), 44 Pac. Rep. 662.

One railroad corporation, having merely bought the road-bed of another, with intent to complete the road, has no right to purchase the vendor's stock subscriptions and enforce them against subscribers. *West End, etc. R. Co. v. Dameron*, 4 Mo. App. 414 (1877).

¹ *Cholette v. Omaha, etc. R. Co.*, 26 Neb. 159 (1889), (41 N. W. Rep. 1106). See also *Acker v. Alexandria, etc. R. Co.*, 84 Va. 648 (1888), (5 S. E. Rep. 688); *Naglee v. Alexandria, etc. R. Co.*, 83 Va. 707 (1887), (3 S. E. Rep. 369).

² *Pennison v. Chicago, etc. R. Co.*, 93 Wis. 344 (1896), (67 N. W. Rep. 702).

For full consideration of this question with reference to the liability of a lessor corporation see *post*, ch. 19: "*Rights and Liabilities of Lessor Corporation.*"

§ 155. **Liabilities of Vendor Corporation in Case of Unauthorized Sale.** — Whatever question there may be as to the liability of a vendor corporation in case of an authorized sale, it is indisputable that it remains liable for the torts of the vendee in case of an *unauthorized* sale.

A railroad company cannot absolve itself from continued liability for negligence by transferring its franchises to another company in the absence of a statute sanctioning the sale.¹

§ 156. **Quo Warranto and other Proceedings against Vendor Corporation.** — An attempt by a railroad company to sell its railroad and franchises may furnish ground for the forfeiture of its charter in *quo warranto* proceedings.²

Especially is this true where a corporation, in transferring its property and franchises, acts, not only without authority but in direct violation of a constitutional provision against a sale to a competing company, and persists in the *non-user* of its franchises.³

Of the power of the State to reach a foreign corporation — party to such an unlawful contract — the Supreme Court of Texas, in *East Line, etc. R. Co. v. State*,⁴ said: "The courts of this State would have no power to declare a forfeiture of the charter of that corporation granted by the laws of the State where it was created, but would have power to withdraw the franchise here granted, whenever the facts justified it, and, by injunction or otherwise, to prevent its carrying on business in this State in violation of its laws. They would also have power to place property controlled by it and situated in this State in the hands of a receiver, and to adjust the rights of such persons as might be shown to have valid claims against it, or even to avoid a valid incorporation in this State by those interested in property acquired by it in an unlawful manner."

¹ *East Line, etc. R. Co. v. Rushing*, 69 Tex. 306 (1887), (6 S. W. Rep. 834). See also *post*, ch. 19: "*Rights and Liabilities of Lessor Corporation*."

² *State v. Minnesota Central R. Co.*, 36 Minn. 246 (1886), (30 N. W. Rep. 816). That a sale of its road by a turnpike company is a ground for the

forfeiture of its charter see *State v. Pawtuxet Turnpike Co.*, 8 R. L. 521 (1867), (94 Am. Dec. 123).

³ *East Line, etc. R. Co. v. State*, 75 Tex. 434 (1889), (12 S. W. Rep. 690).

⁴ *East Line, etc. R. Co. v. State*, 75 Tex. 451 (1889), (12 S. W. Rep. 690).

II. *Rights and Liabilities of Vendee Corporation.*

§ 157. *Essential Franchises pass upon Sale of Railroad.* —

A grant of authority to sell a railroad, without expressly including its franchises, embraces, by implication, the right to transfer those franchises which are essential to the maintenance and operation of the railroad. A sale of a railroad, under statutory authority, carries with it the ordinary franchises necessary for the use of the railroad property and without which it would be useless.¹

§ 158. *Rights and Powers of Vendee Corporation — In General.* — A grant to a railroad company of power to sell its property and franchises, without limitation, authorizes the sale of all its property and franchises,² except the franchise of corporate existence.³ The vendee corporation, under a sale in pursuance of such authority, may enjoy the property and exercise the franchises as freely as if directly granted to it.

Statutes authorizing the sale of a railroad and franchises sometimes define the *status* of the vendee corporation and designate the rights and franchises acquired by the purchase.⁴

¹ *United States*: New Orleans, etc. R. Co. v. Delamore, 114 U. S. 501 (1884), (5 Sup. Ct. Rep. 1009); Branch v. Jesup, 106 U. S. 468 (1883), (1 Sup. Ct. Rep. 495). *Contra* Pullan v. Cincinnati, etc. R. Co., 4 Biss. (U. S.) 35 (1865).

Alabama: Meyer v. Johnston, 53 Ala. 237 (1875).

Massachusetts: East Boston Freight R. Co. v. Eastern R. Co., 13 Allen, 422 (1866).

Pennsylvania: Gloninger v. Pittsburgh, etc. R. Co., 139 Pa. St. 13 (1891), (21 Atl. Rep. 211).

Texas: Compare Missouri Pac. R. Co. v. Owens, 1 Texas App. Civ. Cas. § 385 (1883).

Wisconsin: Pierce v. Milwaukee, etc. R. Co., 24 Wis. 551 (1869).

England: County of Gloucester Bank v. Rudry Merthyr, etc. Co., L. R. 1 Ch. 629 (1895).

² Pierce v. Milwaukee, etc. R. Co., 24 Wis. 551 (1869). See also Sioux City

Terminal R. etc. Co. v. Trust Co. of North America, 82 Fed. 124 (1897); Threadgill v. Pumphrey, 87 Tex. 573 (1895), (30 S. W. Rep. 356).

³ See ante, § 132: "*Transferability of Franchise of Corporate Existence.*"

⁴ In *Indiana* a purchasing company may mortgage franchises acquired and issue new stock and bonds. (Burns' R. S. 1901, § 5215.)

In *Nebraska* the purchasing company is vested with all the property and franchises of the vendor, and may receive municipal aid, etc. (Comp. Stat. 1901, § 4018). Foreign purchasing companies have all the powers and rights of domestic railroad companies (*Ib.* § 4024).

In *Nevada* foreign purchasing companies may hold and exercise franchises to the same extent as if domestic corporations (Sess. Laws 1901, p. 51).

In *Ohio* the purchasing company acquires all the rights, privileges and easements of the vendor (Bates' Anno.

§ 159. **Right of Eminent Domain.** — Probably the right of eminent domain would not pass by implication, as an essential franchise, under a transfer which included in terms only a *railroad*.¹ But when the conveyance, in pursuance of statutory authority, embraces a railroad and *franchises*, the right of eminent domain passes, with other franchises, to the purchasing corporation.² Thus, a purchaser who acquires the property of a railroad company and “all its contracts, franchises, rights, privileges and immunities,” acquires the right of eminent domain.³

Where, however, a railroad is sold in sections to different purchasers, the right of eminent domain belonging to the vendor corporation is not parcelled out.⁴ A purchasing corporation does not succeed to a right of eminent domain of a peculiar nature granted to a vendor corporation by special statute.⁵

A purchasing corporation does not acquire the right to prosecute condemnation proceedings, pending at the time of the purchase.⁶

Stat. (1787-1902) §§ 3300, 3384 (d), 3409).

In *Oklahoma* a foreign purchasing company possesses all the “rights, powers, privileges and franchises” conferred upon railroad companies by the laws of that Territory (Sess. Laws 1901, art. 4, ch. 11, p. 86).

In *Pennsylvania* all rights, property and franchises of vendor vest in acquiring corporation (Laws 1901, p. 53, Act No. 20). This statute is of limited application.

In *Utah* the purchasing company is vested with all the rights and franchises of the vendor and of domestic corporations generally; may extend its lines; may lease or purchase connecting lines; may issue bonds and mortgage property, etc. (Laws 1901, ch. 26, p. 21, § 4).

In *Wisconsin* the purchasing company takes all the rights, privileges and immunities of the vendor (Stat. 1888, § 1833, as amended by Laws 1899, ch. 191).

¹ In *Mayor of Worcester v. Norwich*,

etc. R. Co., 109 Mass. 103 (1871), it was held that authority to lease a *railroad* would not confer, by implication, the right of eminent domain upon the lessee. Compare *New Orleans, etc. R. Co. v. Delamore*, 114 U. S. 501 (1885), (5 Sup. Ct. Rep. 1009).

² *Lawrence v. Morgan's Louisiana, etc. Co.*, 39 La. Ann. 427 (1887), (2 So. Rep. 69, 4 Am. St. Rep. 265).

In *Arkansas* (S. & H. Dig. 1894, § 6342), *Nevada* (Sess. Laws 1901, p. 51) and *Ohio* (Bates' Anno. Stat. (1787-1902), § 3300), *Wyoming* (R. S. 1899, § 3206), it is provided by statute that a purchasing corporation shall acquire the right of eminent domain.

³ *North Carolina, etc. R. Co. v. Carolina Central R. Co.*, 83 N. C. 489 (1880).

⁴ *State v. Morgan*, 28 La. Ann. 482 (1876).

⁵ *Little Rock, etc. R. Co. v. McGehee*, 41 Ark. 202 (1883).

⁶ *Mahoney v. Spring Valley Water Co.*, 52 Cal. 159 (1877).

§ 160. **Exemptions from Taxation.**—An exemption from taxation is a personal privilege of the corporation to which it is granted. It cannot be transferred, unless the legislature, in authorizing a sale, uses apt words to describe the exemption, as distinguished from other privileges, and the legislative intention that it should pass is clearly apparent.¹

In *Memphis, etc. R. Co. v. Commissioners*² Mr. Justice Matthews said: "Exemption from taxation must be construed to have been the personal privilege of the very corporation specifically referred to, and to have perished with that, unless the express and clear intention of the law requires the exemption to pass as a continuing franchise to a successor. This salutary rule of interpretation being founded upon an obvious public policy which regards such exemptions as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirement of the grants, is construed *strictissimi juris*."

In the application of this rule the words "rights," "franchises" and "privileges" have been held not to include an

¹ *United States*: *Yazoo, etc. R. Co. v. Adams*, 180 U. S. 22 (1901), (21 Sup. Ct. Rep. 240); *Phoenix Fire, etc. Ins. Co. v. Tennessee*, 161 U. S. 174 (1896), (16 Sup. Ct. Rep. 471); *Wilmington, etc. R. Co. v. Alsbrook*, 146 U. S. 279 (1892), (13 Sup. Ct. Rep. 72); *Picard v. East Tennessee, etc. R. Co.*, 130 U. S. 637 (1889), (9 Sup. Ct. Rep. 640); *Chesapeake, etc. R. Co. v. Miller*, 114 U. S. 176 (1885), (5 Sup. Ct. Rep. 813); *Memphis, etc. R. Co. v. Commissioners*, 112 U. S. 609 (1884), (5 Sup. Ct. Rep. 299); *Railroad Co. v. Palmes*, 109 U. S. 244 (1883), (3 Sup. Ct. Rep. 193); *East Tennessee, etc. R. Co. v. Hamblin Co.*, 102 U. S. 273 (1880); *Railroad Co. v. Gaines*, 97 U. S. 697 (1878); *Morgan v. Louisiana*, 93 U. S. 217 (1876).

Arkansas: *Arkansas, Midland R. Co. v. Berry*, 44 Ark. 17 (1884).

Kentucky: *Evansville, etc. R. Co. v. Commonwealth*, 9 Bush, 438 (1872);

Commonwealth v. Nashville, etc. R. Co., 93 Ky. 430 (1892), (20 S. W. Rep. 383).

Minnesota: *Contra, St. Paul, etc. R. Co. v. Parcher*, 14 Minn. 297 (1869).

Missouri: *State v. Chicago, etc. R. Co.*, 89 Mo. 523 (1886), (14 S. W. Rep. 522).

New Jersey: *Assessors v. Morris, etc. R. Co.*, 49 N. J. L. 193 (1886), (7 Atl. Rep. 826).

South Carolina: *Contra, Hand v. Savannah, etc. R. Co.*, 17 S. C. 280 (1881).

Tennessee: *Wilson v. Gaines*, 9 Baxt. 546 (1877), (*affirmed* 103 U. S. 417), (1880).

See also *ante*, § 72, "Exemptions from Taxation" (consolidation).

² *Memphis, etc. R. Co. v. Commissioners*, 112 U. S. 609 (1884), (5 Sup. Ct. Rep. 299).

exemption from taxation;¹ while the contrary has been held with reference to the word "immunities."²

§ 161. **Right to fix Rates of Fare. Chartered Rates.** — It has been held that the rates prescribed in the charter of a railroad company for transportation upon its railroad follow the property when sold, and attach to its operation by a purchasing company.³ Thus in *Campbell v. Marietta, etc. R. Co.*,⁴ the Supreme Court of Ohio said: "It must be inferred that the legislature intended the purchasing company to succeed to

¹ The decisions of the Supreme Court of the United States are irreconcilable.

In *Railroad Co. v. Gaines*, 97 U. S. 697 (1878), it was held that an exemption from taxation was not carried by the use of the words "rights, powers and privileges." In *Keokuk, etc. R. Co. v. Missouri*, 152 U. S. 301 (1894), (14 Sup. Ct. Rep. 592), it was doubted whether, under the name "franchises and privileges," an exemption would pass. In *Chesapeake, etc. R. Co. v. Miller*, 114 U. S. 176 (1885), (5 Sup. Ct. Rep. 813), it was decided that an exemption did not pass to the purchaser by the use of the words "franchises, rights and privileges." In *Morgan v. Louisiana*, 93 U. S. 217 (1876), it was held that the words "franchises, rights and privileges" did not, necessarily, include an exemption from taxation. See also *Phoenix, etc. Ins. Co. v. Tennessee*, 161 U. S. 182 (1896), (16 Sup. Ct. Rep. 471); *Wilmington, etc. R. Co. v. Alsbrook*, 146 U. S. 279 (1892), (13 Sup. Ct. Rep. 72). Also *Evansville, etc. R. Co. v. Commonwealth*, 9 Bush (Ky.), 438 (1892). On the other hand, in *Humphrey v. Pegues*, 16 Wall. (U. S.) 244 (1872), the Supreme Court held the words, "all the rights, powers and privileges," to include an exemption from taxation. Again in *Tennessee v. Whitworth*, 117 U. S. 139 (1886), (6 Sup. Ct. Rep. 649), it was said that the same words included the right of exemption. Chief Justice Waite, in his opinion, said (p. 146): "As has already been seen, the word 'privilege,' in its

ordinary meaning, when used in this connection, includes an exemption from taxation." See also *Atlantic, etc. R. Co. v. Allen*, 15 Fla. 637 (1876); *Louisville, etc. R. Co. v. Gaines*, 3 Fed. 266 (1880).

While the opinions cannot be reconciled the conclusion to be drawn from the later decisions of the Supreme Court of the United States is that there must be other language than the words "rights," "franchises" and "privileges" or other provisions sufficient to remove all doubt as to the legislative intention before the transfer of an exemption from taxation can take place.

Phoenix Ins. Co. v. Tennessee, 161 U. S. 182 (1896), (16 Sup. Ct. Rep. 471); *Wilmington, etc. R. Co. v. Alsbrook*, 146 U. S. 279 (1892), (13 Sup. Ct. Rep. 72); *Picard v. East Tennessee, etc. R. Co.*, 130 U. S. 637 (1889), (9 Sup. Ct. Rep. 640).

² *Phoenix Ins. Co. v. Tennessee*, 161 U. S. 177 (1896), (16 Sup. Ct. Rep. 471); *Louisville, etc. R. Co. v. Palmes*, 109 U. S. 252 (1883), (3 Sup. Ct. Rep. 193); *Trask v. Maguire*, 18 Wall. (U. S.) 391 (1873); *Nichols v. New Haven, etc. R. Co.*, 42 Conn. 103 (1875); *Commonwealth v. Owensboro, etc. R. Co.*, 81 Ky. 572 (1884); *State v. Nashville, etc. R. Co.*, 12 Lea (Tenn.), 583 (1883).

³ *Campbell v. Marietta, etc. R. Co.*, 23 Ohio St. 168 (1872); *Peters v. Railroad Co.*, 42 Ohio St. 275 (1884).

⁴ *Campbell v. Marietta, etc. R. Co.*, 23 Ohio St. 168 (1872).

the powers and privileges of the vending company, and to none other. . . . The intrinsic as well as the market value of such property as a railroad largely depends upon the rates which may be charged for transportation thereon. Now, if the chartered rates follow the property, the contracting parties stand on perfect equality, but if the value, or, in other words, the inducement to contract, depends upon the chartered privilege of the purchaser, the equality is not preserved, and especially would different companies with different charters occupy unequal grounds as bidders for and purchasers of such property."

This decision is too broad. It may be that restrictions and limitations upon rates of fare presumptively attach as *burdens* to railroads when sold; but the converse of the proposition is not true that the chartered rates so follow the property as *privileges*. In the absence of an express statutory direction, the right to fix and determine rates of fare, or to charge a greater rate than permitted by general laws, does not accompany a railroad in its transfer to a purchaser.¹

§ 162. **Obligations of Vendee Corporation in Respect of Public Duties of Vendor.** — As a general rule, a vendee corporation, in the operation of a purchased railroad, takes the place of the vendor company and must hold and operate the road subject to the conditions attaching to it in the hands of the vendor.²

While a vendor corporation may remain liable upon its public obligations notwithstanding a sale of its railroad, it seems clear that a vendee company, in purchasing and taking over a railroad and franchises, assumes and is bound to perform the accompanying obligations to the State.³

¹ St. Louis, etc. R. Co. v. Gill, 156 U. S. 656 (1895), (15 Sup. Ct. Rep. 484).

In Norfolk, etc. R. Co. v. Pendleton, 156 U. S. 667 (1895), (15 Sup. Ct. Rep. 484), *affirming* 86 Va. 1004 (1890), (11 S. E. Rep. 1062), it was held that a right to fix tolls, conferred upon a vendor corporation, could not be claimed by a purchasing company organized under general laws, and, therefore, subject to a statute fixing rates of fare. See also Dow v. Beidelman, 49 Ark. 325 (1887), (5 S. W. Rep. 297).

² Daniels v. St. Louis, etc. R. Co., 62 Mo. 43 (1876).

³ A railroad company which purchases the property and franchises of any other company pursuant to a Michigan Statute (Act No. 10, Laws 1889), holds subject to all the duties and obligations prescribed by the general railroad laws of the State. Thayer v. Flint, etc. R. Co., 93 Mich. 150 (1892), (53 N. W. Rep. 216).

§ 168. **Vendee Corporation not liable upon Obligations of Vendor unless assumed or imposed by Law.** — A railroad company purchasing, in good faith and for value, the railroad and franchises of another company is not liable for the obligations of the latter company which are not liens upon the property.¹

The reason for the rule and its qualifications are clearly stated by the Supreme Court of Arkansas in *Sappington v. Little Rock, etc. R. Co.*:² "It would not, as a matter of law, by virtue of its purchase of the property and franchises of the consolidated company, become bound to fulfil its personal obligations, as distinct from those which were liens upon the property. If the purchasing company knew of any equities against the other in favor of third persons, and bought subject to them, it might make a different case, and, perhaps, afford ground for some appropriate relief in chancery. But the obligation is not transferred *ipso facto* on the purchase. Otherwise no sale could ever be made of a railroad, from fear of coming into a *damnosa hereditas*."

But when a purchasing corporation, as a part of the consideration for the transfer, assumes the obligations of the vendor company, it is, manifestly, liable for all obligations whether founded in contract or tort.³ It has been held, however, that before such a purchaser can be held liable for a tort

¹ *Sappington v. Little Rock, etc. R. Co.*, 37 Ark. 23 (1881).

In *Chesapeake, etc. R. Co. v. Griest*, 85 Ky. 625 (1887), (4 S. W. Rep. 323), the Supreme Court of Kentucky said: "If the power to sell is given by the terms of the grant, the purchaser for value holds the property as if it had been an individual transaction. There is no reason for making a distinction, and the rule in individual transactions should apply as between corporations when the power to sell and purchase is conferred by charter. While a dissolution of a corporation would entitle the creditors to enforce their demands in a court of equity, or where there is a consolidation to follow the assets of their debtor in the consolidated company, still, where there is a sale of the corporate property, it passes the title as to all,

in the absence of some reservation in the charter protecting the rights of creditors."

See also *Hammond v. Port Royal, etc. R. Co.*, 15 S. C. 10 (1881); *Texas Cent. R. Co. v. Lyons* (Tex. Civ. App. 1896), 34 S. W. Rep. 363. Compare *Chicago, etc. R. Co. v. Chicago, etc. Coal Co.*, 79 Ill. 121 (1875). See also *ante*, § 123: "*Liability of Purchasing Corporation for Debts of Vendor Company*."

² *Sappington v. Little Rock, etc. R. Co.*, 37 Ark. 27 (1881).

³ *Chesapeake, etc. R. Co. v. Griest*, 85 Ky. 619 (1887), (4 S. W. Rep. 323). See also *Union Trust Co. v. Illinois Mid. R. Co.*, 117 U. S. 434 (1886), (6 Sup. Ct. Rep. 809); *Hervey v. Illinois Mid. R. Co.*, 28 Fed. 169 (1884).

committed by the vendor company in the operation of the road before the sale, the claim must be reduced to judgment in an action against the vendor.¹

A provision in the charter of a railroad company authorizing it to purchase the railroad of another company and stipulating that the sale shall in no way affect the rights of the latter's creditors, protects unsecured creditors.² The word, "indebtedness," as used in a statute providing that a purchasing railroad company shall assume the indebtedness of its vendor embraces all debts and demands — claims founded both upon tort and contract.³

§ 164. *Status of Foreign Vendee Corporation.* — The legislature, in granting to a foreign corporation power to purchase a railroad and franchises within the State, may prescribe the terms and conditions upon which the purchase may be made and define the *status*, within the State, of the purchasing corporation.⁴ And, in Georgia, it has been held that where permission to a foreign corporation to purchase a domestic railroad is made the subject of an original and direct grant by the legislature, the purchasing corporation, upon the purchase, "becomes *eo instanti* the offspring of the legislative will of the State."⁵

¹ Where the purchasing corporation undertook to pay "all current indebtedness" incurred by the vendor in the operation of its railroad, it was held that, even if the contract could be construed to render the purchaser liable for a tort committed by the vendor in the operation of its road, the claim must first be reduced to judgment in an action against the vendor. *Chesapeake, etc. R. Co. v. Griest*, 85 Ky. 619 (1887), (4 S. W. Rep. 323).

² *Montgomery, etc. R. Co. v. Branch*, 59 Ala. 139 (1877).

³ *Chicago, etc. R. Co. v. Lundstrom*, 16 Neb. 254 (1884), (20 N. W. Rep. 198).

The following statutes provide, in substance, that the sale of a railroad as therein authorized shall not affect the rights of creditors: *Alabama*, Code

1896, § 1169 (as amended in 1899); *Arizona*, R. S. 1901, par. 864, § 1; *Arkansas*, S. & H. Dig. 1894, § 6188; *California*, Pomeroy's Code 1901, § 494; *Michigan*, Comp. Laws 1897, § 6328; *Nebraska*, Comp. Stat. 1901, §§ 1769, 4020, 4024, 4026; *New Jersey*, Laws 1900, ch. 46, p. 70; *Ohio*, Bates' Anno. Stat. (1787-1902), § 3300; *Wisconsin*, Stat. 1898, § 1833 (as amended in 1899).

⁴ *State v. Chicago, etc. R. Co.*, 89 Mo. 523 (1886), (14 S. W. Rep. 522).

⁵ *Angier v. East Tennessee, etc. R. Co.*, 74 Ga. 640 (1885). The Court said (p. 641): "The truth is to be ascertained whether the State intended merely to license a foreigner to exercise franchises and buy a charter she granted to another without assuming all the liabilities which the charter it bought required, or did she intend it to be a domestic

corporation and under all the obligations of corporate citizenship? It is a question of intention; and it cannot be that she meant to make any such contract, with but one side to it, with anybody, natural or artificial, that might buy the charter she had granted. It must be that she intended, and expressed the intention in plain words, to substitute the purchaser for the entity she allowed to be purchased and to make the purchaser subject to her control within her own borders as fully as the seller of the charter had been before the sale."

PART III.

CORPORATE LEASES.

ARTICLE I.

CHAPTER XV.

LEASES OF CORPORATE PROPERTY AND FRANCHISES.

I. Leases of Property of Private Corporations.

- § 165. Power to lease and take a Lease generally.
- § 166. Lease of Entire Property of Prosperous Corporation.
- § 167. Lease of Entire Property of Losing Corporation.
- § 168. Voidable Leases.
- § 169. Remedies of Objecting Stockholders.

II. Leases of Property and Franchises of Quasi-public Corporations.

- § 170. Distinction between Leases of Private and Quasi-public Corporations.
- § 171. Leases of Indispensable Property of Quasi-public Corporation.
- § 172. Leases of Surplus Property.
- § 173. Leases of Franchises.
- § 174. Railroad Leases typical of Leases of Quasi-public Corporations.

I. Lease of Property of Private Corporations.

§ 165. Power to lease and take a Lease generally. — Every corporation, as an incident to its existence, has power to acquire and dispose of property.¹ The greater power to sell and purchase includes the lesser power to lease and take a lease.²

¹ See *ante*, § 108: "*Power to purchase and sell generally.*" corporation to sell real estate not required for its use did not authorize a

² The decision in *Metropolitan Concert Co. v. Abbey*, 52 N. Y. Super. Ct. 97 (1885), that authority granted to a lease thereof for a term of years cannot be justified upon principle.

A corporation has implied power to lease any portion of its property not required for the purposes of its business;¹ and may take a lease of property for the purpose of promoting its legitimate interests,² but not for a purpose entirely foreign thereto.³

§ 166. **Lease of Entire Property of Prosperous Corporation.**—While a lease of a portion of the property of a corporation—not impairing its capacity to do business—may be authorized by its directors or a majority of its stockholders, they have no authority to lease the entire property and business of the corporation. A lease by a prosperous corporation of all

¹ *Indiana*: Phillips v. Aurora Lodge, 87 Ind. 505 (1882).

Massachusetts: Nye v. Storer, 168 Mass. 53 (1897), (46 N. E. Rep. 402). In this case it was held that a corporation authorized by its charter to hold property might lease it so as to produce an income, for purposes entirely different from its own objects of incorporation.

Missouri: Gilliland v. Chicago, etc. R. Co., 19 Mo. App. 411 (1885).

New York: Denike v. New York, etc. Cement Co., 80 N. Y. 599 (1880); Smith v. Berndt, 1 N. Y. Supp. 108 (1888).

Pennsylvania: Ardesco Oil Co. v. North American Oil, etc. Co., 66 Pa. St. 375 (1870).

Tennessee: Coal Creek, etc. Co. v. Tennessee Coal, etc. Co., 106 Tenn. 651 (1901), (62 S. W. Rep. 162).

England: Featherstonhaugh v. Lee Moor Porcelain Clay Co., L. R. 1 Eq. 318 (1865); Simpson v. Westminster, etc. Hotel Co., 8 H. L. Cas. 712 (1860).

Power to sell land includes power to lease with an option of purchase. *Re Female Orphan Asylum*, 17 L. T. (N. S.) 59 (1867).

² *Abby v. Billups*, 35 Miss. 618 (1858), (72 Am. Dec. 143); *Crawford v. Longstreet*, 43 N. J. L. 325 (1881). In *Jacksonville, etc. R. Co. v. Hooper*, 160 U. S. 514 (1896), (16 Sup. Ct. Rep. 379), it was held that a railroad company might lease and maintain a hotel at its terminus. The Court said

(p. 523): "Courts may be permitted, where there is no legislative prohibition shown, to put a favorable construction upon such exercise of power by a railroad company as is suitable to promote the success of the company, within its chartered powers, and to contribute to the comfort of those who travel thereon. To lease and maintain a summer hotel at the seaside terminus of a railroad might, obviously, increase the business of the company and the comfort of its passengers, and be within the provisions of the statute of Florida above cited, whereby a railroad company is authorized "to sell, lease, or buy any land or real estate necessary for its use," and to "erect and maintain all convenient buildings . . . for the accommodation and use of their passengers."

A foreign corporation has power to take a lease of property necessary for the transaction of its business. *Northern Transportation Co. v. Chicago*, 7 Biss. (U. S.), 45 (1874), *affirmed* 99 U. S. 635 (1878).

³ *Occum Co. v. A. & W. Sprague Mfg. Co.*, 34 Conn. 529 (1868). In this case it was held that a corporation, chartered for a specific purpose, had no power to take a lease of property not needed for that purpose, with the intention and for the object of harassing another party by the use, under the forms of law, of the supposed rights thus obtained.

its property constitutes such a departure from the purpose for which it was organized that, in the absence of express statutory authority, it can be authorized only by the unanimous consent of its stockholders.¹

This limitation upon the power of the majority is entirely apart from any public duty the corporation may owe. It is founded upon the principle that every stockholder in a going concern has a right to insist that its affairs be administered by its own officers. He is entitled to participate in dictating the policy of the company and to receive a proportion of the profits of the enterprise rather than a share of a fixed rental.

¹ In *Cass v. Manchester*, 9 Fed. 642 (1881), Judge McKennan said: "The change proposed here is not organic, it is true, but it is thorough and fundamental, as it affects the administration of the company's affairs. It involves a withdrawal, from the control and management of the stockholders, of the entire property of the corporation for a period of at least five years; it will preclude, for a like period, the exercise annually by the stockholders of their judgment as to the particular character and method of conducting the business affairs of the corporation."

A manufacturing corporation made a lease of its plant and all its property to its president for a term of two and one-half years and it was *held* that the lease was void in that it suspended the business of the corporation for more than a year, and that it amounted to a surrender of the charter of the corporation, under a statute providing that a corporation, suspending its ordinary business for more than a year, should be deemed to have surrendered its charter. *Conro v. Port Henry Iron Co.*, 12 Barb. (N. Y.) 27 (1851). See also *Copeland v. Citizens Gaslight Co.*, 61 Barb. (N. Y.) 60 (1871).

It has been held, however, that when a corporation is expressly authorized by its charter to lease its property it may lease its entire property, although it is thereby disabled from continuing business. *Gubernator v. City of New Or-*

leans, 20 La. Ann. 106 (1868). In this case the Court said (p. 107): "The power to *lease*, granted by the charter, is unlimited and unrestricted; no distinction is made whether or not it be for the whole or a part of the property. How can we discriminate and distinguish when the law does not? *Ubi lex non distinguit, nec nos distinguere debemus*. Were we to attempt to draw a line of restriction and limitation, where would we trace it? It would be an arbitrary exercise of power on our part, reprobated by law."

In *Small v. Minneapolis, etc. Co.*, 45 Minn. 267 (1891), (47 N. W. Rep. 797), the Court said: "We need not inquire how far, or under what circumstances, considerations of public policy and of the general interests of the State may affect the right of a corporation to discontinue the business for which it was created, and to surrender to another corporation its property and the conduct of such business. We do decide that such a surrender of the property, and, so far as possible, of the functions of a corporation, in order that, while it is still to continue in existence, its business can be carried on by another corporation, to which such transfer is made, would violate the rights of a non-assenting stockholder arising from a contract implied, if not expressed, in the creation of such an organization, and he would be entitled to have such acts restrained by injunction."

He cannot be compelled to accept an annuity in lieu of his share in the profits.

§ 167. **Lease of Entire Property of Losing Corporation.** — When a corporation is in a position where it cannot further profitably carry on its business and is a losing concern, a majority of its stockholders, for the purpose of protecting the whole body from further loss and as a method of winding up the affairs of the corporation, may authorize the lease of its entire property and business to another corporation or person, provision being made for creditors.¹ But a lease — which must necessarily occasion delay in winding up the affairs of a corporation and in distributing its assets — can only be justified, under such circumstances, when it appears to be the best method of realizing upon the assets of the company. Its term must be fixed with reference to the fact that it is executed only as a method of winding up the affairs of the corporation within a reasonable time. A lease for a long term of years would be invalid without the unanimous consent of the stockholders.²

¹ *Denike v. New York, etc. Cement Co.*, 80 N. Y. 608 (1880): "The lessee by the terms of the lease was to carry on the business of manufacturing and selling cement, so that the brand of the company would be kept before the public. I do not understand that this company could not lawfully temporarily lease its property to some person who would carry on its business when it could not profitably do so."

A manufacturing corporation, for the purpose of protecting its stockholders from further loss, may discontinue the business and sell or lease its property. *Skinner v. Smith*, 134 N. Y. 240 (1892), (31 N. E. Rep. 911).

The directors of a manufacturing company which has been unsuccessfully carrying on business and whose financial standing is impaired, may, with the consent of a majority of the stockholders' lease its entire plant and business to another corporation for ten years with the privilege of purchase,

the lease being the best means of preventing insolvency and the transaction being in good faith. *Bartholomew v. Derby Rubber Co.*, 69 Conn. 521 (1897), (38 Atl. Rep. 45). See *ante*, § 111, "*Sale of Entire Property of Losing Corporation by Majority Vote.*"

² In an English case, however, where wide powers were given by the clauses of the charter of a porcelain company to a two-thirds vote of the stockholders, it was held that, after a period of nine years of unsuccessful working, a majority of two-thirds of the shareholders in general meeting were empowered, under such clauses, to authorize the directors to make a valid mining lease for twenty-one years of the whole of the works and buildings of the company. *Semble*, the clauses would not authorize the like majority to engage the company in a new enterprise wholly unconnected with their original purpose. *Featherstonhaugh v. Lee Moor Porcelain Clay Co.*, L. R. 1 Eq. 318 (1865).

It has been held that even a long term lease might be executed if provision were made for paying dissenting stockholders, at their option, the cash value of their shares.¹ Unless so provided by statute, however, the scheme is open to the objection that it gives a dissenting stockholder a *theoretical* distributive share instead of the *actual* share of the assets to which he is entitled.² If such a method be provided, it can only be followed when it is clear that the corporation is a losing concern. It can never be adopted for the purpose of forcing a stockholder in a prosperous company either to sell out or consent to a lease.

§ 168. **Voidable Leases.** — The directors of a corporation are its trustees. They cannot deal with corporate property for their personal benefit. A lease of the property of a corporation to another corporation in which a director is interested is voidable at the option of either corporation.³ When the cor-

¹ In *Black v. Delaware, etc. Canal Co.*, 22 N. J. Eq. 415 (1871), Chancellor Zabriskie said: "If I am right in the conclusion arrived at above, that the majority of corporators under a charter, which specifies no definite time for its continuance, have a right to abandon the undertaking, and dispose of and divide the property, the proceeding in this case is valid as against the complainants as a lawful way of accomplishing that end as to them. Two-thirds of these corporators have determined that they do not desire to go on with these enterprises, under the charters, and that they wish to abandon them, and are willing to accept as their share of the corporate property a yearly rent or annuity secured by a provision like that contained in this proposed lease. Some stockholders are not willing; and although the majority can effect the abandonment, they cannot compel the dissentients to accept like compensation for their stock; it might be compelling them to embark in a new enterprise. Provision is, therefore, made to pay or return to them the full value of their share of the whole property of the cor-

poration. This is all they would have if the works were sold out. The provision is a most equitable one, and without it the transaction, even if valid and legal, would not be equitable and just."

² See *ante*, § 121: "*Appraisal of Stock of Dissenting Stockholders.*"

³ Where a trustee of a corporation, whose presence is necessary to make a majority for the transaction of corporate business, is interested in another corporation to which the board vote to lease the entire property of the corporation, the lease, executed in pursuance of such authority, is voidable upon the complaint of any stockholder. *Parsons v. Tacoma Smelting, etc. Co.* (Wash. 1901), 65 Pac. Rep. 765.

A lease by an officer of a corporation of property to the corporation may be binding upon the company when made in good faith and ratified by it by taking possession and paying rent for a time according to the terms of the lease. *Louisville, etc. R. Co. v. Carson*, 151 Ill. 444 (1894), (38 N. E. Rep. 140). See also *post*, § 248: "*Voidable Railroad Leases.*"

poration fails to act a court of equity may intervene at the instance of any stockholder.

The majority of the stockholders of a corporation stand in a similar fiduciary relation towards the minority. They can authorize the lease of corporate property to another corporation, controlled by themselves, only when they act in the utmost good faith towards minority stockholders. In *Meeker v. Winthrop Iron Co.*¹ Judge Baxter in declaring void, as a fraud upon minority stockholders, a lease of a mining property authorized by a majority of the stockholders of a corporation to another corporation of which they likewise held control, said: "The ownership of a majority of the capital stock of a corporation invests the holders thereof with many and valuable incidental rights. They may legally control the company's business, prescribe its general policy, make themselves its agents, and take reasonable compensation for their services. But, in thus assuming control, they also take upon themselves the correlative duty of diligence and good faith. They cannot lawfully manipulate the company's business in their own interests to the injury of other corporators."

§ 169. **Remedies of Objecting Stockholders.** — Any stockholder in a prosperous corporation who objects to a lease of the entire property and business of his corporation is entitled to an injunction to restrain its execution.² But an injunction will not be granted where a lease of only a part of the property of the corporation, insufficient to interfere with the continued prosecution of its business, is contemplated.³

Courts of equity, at the instance of stockholders, will also

¹ *Meeker v. Winthrop Iron Co.*, 17 Fed. 50 (1883). See also cases cited in notes to *post*, § 248: "*Voidable Railroad Leases.*"

² A stockholder in a manufacturing corporation may enjoin a lease, authorized by a majority of the stockholders, of all its property and business for twenty-five years at a rental equal to one-half the profits derived from the business. *Small v. Minneapolis, etc. Co.*, 45 Minn. 264 (1891), (47 N. W.

Rep. 797). Also *Copeland v. Citizens Gaslight Co.*, 61 Barb (N. Y.) 60 (1871).

That a lease, although unlawful, does not give a portion of the stockholders a standing in equity to ask for the dissolution of the corporation, see *Denike v. New York, etc. Cement Co.*, 80 N. Y. 599 (1880). See also *ante*, § 114: "*Remedies of Dissenting Stockholders in Case of Invalid or Unfair Sales.*"

³ *Small v. Minneapolis, etc. Co.*, 57 Hun (N. Y.), 587 (1890), (10 N. Y. Supp. 456).

issue injunctions to restrain the execution of leases authorized by directors or majority stockholders in violation of their fiduciary obligations.¹

II. *Leases of Property and Franchises of Quasi-public Corporations.*

§ 170. **Distinction between Leases of Private and Quasi-public Corporations.** — Leases of *quasi*-public corporations vary from those executed by private corporations, owing no public duties, in their need of the approval of the State, in the formalities attending their execution, and in their essential nature. A lease by a private corporation is generally an incident to its business, runs for a limited term and is analogous to a lease by a natural person. A lease by a *quasi*-public corporation of its property and franchises requires legislative sanction, must follow the conditions of the legislative grant, and is, when executed for the customary periods — ninety-nine or nine-hundred and ninety-nine years — substantially *a sale in consideration of an annuity*. While the relation of the parties is that of landlord and tenant, and the lease may be the subject of forfeiture, for practical purposes, based upon present and future control of the franchises and property, the lessee stands in the position of owner.

§ 171. **Leases of Indispensable Property of Quasi-public Corporation.** — Upon principles already considered, property necessary for the performance of the public duties of a *quasi*-public corporation cannot be leased, without statutory authority.² The test of indispensability applicable in the case of corporate sales applies in the case of corporate leases.³

§ 172. **Leases of Surplus Property.** — The greater power to sell and absolutely convey the surplus property of a *quasi*-public corporation includes the lesser power to lease it.⁴

¹ *Meeker v. Winthrop Iron Co.*, 17 Fed. 48 (1883); *Parsons v. Tacoma Smelting, etc. Co.* (Wash. 1901), 65 Pac. Rep. 765. See also cases cited in notes to § 248, *post*: “*Voidable Railroad Leases.*”

² See *ante*, § 127: “*Indispensable*

Property cannot be alienated or taken on Execution without Statutory Authority.”

³ See *ante*, § 128: “*Test of Indispensability.*”

⁴ See *ante*, § 129: “*Sales of Surplus Property.*”

In the absence of a statutory prohibition, such a corporation may lease its property, real and personal, not necessary to carry on the business for which it was chartered nor to fulfil its public obligations, in the same manner and upon the same conditions as a natural person.¹ Thus, for example, a railroad company may lease its outlying lands and any rolling stock or other personal property not required in the use and operation of its railroad.² And a ferry company may let its boats when not needed in its business.³

¹ Statutes regulating the method and formalities by which *quasi*-public corporations may lease their property and franchises do not apply to ordinary leases of property not necessary for the proper discharge of corporate duties. *Coal Creek, etc. Co. v. Tennessee, etc. Co.*, 106 Tenn. 651 (1901), (62 S. W. Rep. 162).

² In *Hartford Ins. Co. v. Chicago, etc. R. Co.*, 175 U. S. 99 (1899), (20 Sup. Ct. Rep. 33), Mr. Justice Gray said: "A railroad corporation holds its station grounds, railroad tracks and right of way for the public use for which it is incorporated, yet as its private property, and to be occupied by itself or by others, in the manner which it may consider best fitted to promote, or not to interfere with, the public use. It may, in its discretion, permit them to be occupied by others with structures convenient for the receiving and delivering of freight upon its railroad, so long as a free and safe passage is left for the carriage of freight and passengers. . . . The case is wholly different from those cited by the plaintiffs, in which a lease by a railroad corporation, transferring its entire property and franchises to another corporation, and thus undertaking to disable itself from performing all the duties to the public imposed upon it by its charter, has been held to be *ultra vires*, and therefore void."

And in *Union Pacific R. Co. v. Chicago, etc. R. Co.*, 51 Fed. 321 (1892), Judge Sanborn said: "The result is that it is not beyond the powers of a corporation authorized to construct, maintain

and operate a railroad and its appurtenances to let by contract to a like corporation its surplus rolling stock, or the surplus use of its terminal tracks, depots, and bridges, which it has necessarily acquired for the purpose of its incorporation; provided, always, that such contract in no way disables it from the full performance of its obligations and duties to the State and the public."

In *Attorney-General v. Great Eastern R. Co.*, L. R. 11 Ch. 449 (1879), it was held that the letting for hire by one railroad company to another whose line was connected with its own, and which could only be worked profitably in connection with it, of parts of its surplus rolling stock, was not *ultra vires*.

A railroad company, authorized to construct and operate a telegraph line as well as a railroad, has no power to lease its telegraph line without statutory authorization. Its duties are the same with respect to the telegraph line as to the railroad. *Atlantic, etc. Tel. Co. v. Union Pacific R. Co.*, 1 McCrary (U. S.) 541 (1880), 1 Fed. 745.

³ In *Brown v. Winnisimmet Co.*, 11 Allen (Mass.) 326 (1865), the Court, after referring to the powers of ferry companies and to their right to own extra boats, said (p. 333): "It is not necessary that such extra or additional steamboats should be kept unemployed when not required for the business of the ferry, but . . . it is competent for the defendants to use them or to let them to others to be used in carrying on any legitimate business."

In *Forrest v. Manchester, etc. R. Co.*,

Analogous to this principle in practical results, although based upon essentially different grounds — in that a joint use is distinguishable from a lease — is the principle that a railroad company may grant to another corporation the *surplus use* of its tracks.¹

§ 173. **Leases of Franchises.** — The principles of law governing leases of franchises have already been considered at length in connection with the subject of the sale of franchises.²

§ 174. **Railroad Leases typical of Leases of Quasi-public Corporations.** — As indicated in the preliminary part of this treatise, railroad companies have been granted, and have exercised, the power of leasing their property and franchises to a far greater extent than other corporations of a similar nature. Legal principles relating to leases of *quasi*-public corporations have been established, almost without exception, in cases involving railroad leases.

While, therefore, in the further consideration of the subject special reference will be made to leases of railroads, it must be borne in mind that the principles exemplified are of general application and apply alike to every *quasi*-public corporation — to turnpike, canal, telegraph, telephone, electric light, gas, water and other public utility companies.³

30 Beav. 47 (1861), the Master of the Rolls said: "What are they to do with those steamboats at other times when unemployed at the ferry? Are they to keep them idle? I am of opinion that they are not; and that if the capital of the company is really embarked for the purpose of the ferry and not for the purpose of excursions, when the steamboats are not required to carry over the persons who wish to use the ferry, they are at liberty to use them as they think fit, for the profit of the company, and either to let them out to private parties for excursions, or to carry excursion parties themselves."

¹ Chicago, etc. R. Co. v. Union Pac. R. Co., 47 Fed. 23 (1891), *affirmed sub nom.* Union Pac. R. Co. v. Chicago, etc. R. Co., 51 Fed. 321 (1892), 163 U. S.

564 (1895). See *post*, ch. 24: "*Trackage Contracts.*"

² See *ante*, ch. 12: "*Sales of Corporate Franchises.*"

³ The following cases relate to leases of *quasi*-public corporations other than railroad companies.

Gas and Electric Light Companies: Jersey City Gas Co. v. United Gas Imp. Co., 46 Fed. 264 (1891); Visalia Gas, etc. Co. v. Sims, 104 Cal. 326 (1894), (43 Am. St. Rep. 105, 37 Pac. Rep. 1042); Chicago Gas Light, etc. Co. v. People's Gas Light, etc. Co., 121 Ill. 530 (1887), (13 N. E. Rep. 169, 2 Am. St. Rep. 124); Brunswick Gas Light Co. v. United Gas, etc. Co., 85 Me. 532 (1893), (35 Am. St. Rep. 385, 43 Am. & Eng. Corp. Cas. 459, 27 Atl. Rep. 525); Bath Gas Light Co. v. Claffy,

ARTICLE II.

LEASES OF RAILROADS (INCLUDING TRACKAGE CONTRACTS).

CHAPTER XVI.

NATURE AND AUTHORIZATION OF CONTRACT OF LEASE.

I. *Nature of Lease of Railroad.*

§ 175. What constitutes a Lease of a Railroad.

§ 176. Distinction between Relation of Lessor and Lessee and other Intercorporate Relations.

II. *Legislative Authority for Lease of Railroad.*

§ 177. Lease of Railroad invalid without Legislative Authority.

§ 178. Necessity for Legislative Authority to take a Lease.

§ 179. Legislative Ratification of Unauthorized Lease.

§ 180. What Railroads may be leased. Statutory Provisions.

§ 181. Rule of Construction of Statutes.

§ 182. Construction of Statutes. — (A) Provisions authorizing Leases.

§ 183. Construction of Statutes — (B) Provisions not authorizing Leases.

§ 184. Construction of Statutes. — (C) Power to lease Unfinished Road.

§ 185. Construction of Statutes. — (D) Leases of Connecting Lines.

§ 186. Constitutional and Statutory Prohibitions of Leases of Competing or Parallel Lines.

§ 187. Long Term Leases not prohibited by Statutes against Perpetuities.

I. *Nature of Lease of Railroad.*

§ 175. What constitutes a Lease of a Railroad. — A railroad lease is a conveyance by a railroad company, for rent reserved, of its railroad for any term which leaves a reversionary interest.¹ It necessarily involves a transfer of an estate in

151 N. Y. 24 (1896), (45 N. E. Rep. 390).

Telegraph Companies: Philadelphia v. Western Union Tel. Co., 11 Phila. 327 (1876); Atlantic, etc. Tel. Co. v. Union Pacific R. Co., 1 Fed. 745 (1880), 1 McCrary (U. S.) 541; Western Union Tel. Co. v. Union Pacific R. Co., 3 Fed. 1 (1880), 1 McCrary (U. S.) 418; Central Branch Union Pacific R.

Co. v. Western Union Tel. Co., 2 Fed. 417 (1881), 1 McCrary (U. S.), 551; Reiff v. Western Union Tel. Co., 49 N. Y. Super. Ct. 441 (1883).

¹ A grant and demise by one railroad corporation to another of all its property, real and personal, and all its privileges and franchises in perpetuity, has been held equivalent to an absolute conveyance. Chicago, etc. R. Co. v.

the railroad property and of the franchises attaching thereto. It generally involves a transfer of the railroad and all the franchises of the vendor corporation for a long term of years — often equivalent to a grant of the fee in consideration of stated payments.¹

Boyd, 118 Ill. 73 (1886), (7 N. E. Rep. 487).

See also *Hazard v. Vermont, etc. R. Co.*, 17 Fed. 753 (1883); *Vermont, etc. R. Co. v. Vermont Cent. R. Co.*, 34 Vt. 1 (1861); *Town of Westbrook's Appeal from Commissioners*, 57 Conn. 95 (1889), (17 Atl. Rep. 368). Compare *State v. Housatonic R. Co.*, 48 Conn. 44 (1880).

While this conclusion may be correct where no right of re-entry is reserved in a lease, it is not well founded, as a matter of law, where there is clause of re-entry. A reservation of the right to re-enter together with that of rent, constitute a revisionary interest, — the essential feature of a lease as distinguished from an absolute conveyance.

¹ A vote by a railroad company to agree with another company to take a lease of a railroad to be constructed by the latter and to pay as rent a stipulated percentage upon its cost, and a similar vote of the latter corporation to lease its railroad to the former upon these terms, are merely preliminary and do not constitute an actual lease. *Peters v. Boston, etc. R. Co.*, 114 Mass. 127 (1873).

The receiver of a railroad, the earnings of which were less than the expense of operation, entered into a contract with a company owning a connecting line by which the latter agreed to operate the road, keeping the accounts in the receiver's name and charging against the road only the cost of operation and necessary repairs. It was held that the contract was not a lease, but one under which the latter company operated the road as agent of the receiver. *South Carolina, etc. R. Co. v. Carolina, etc. R. Co.*, 93 Fed. 543 (1899).

A railroad company agreed to sell to another company and the latter agreed to buy, part of its road at a fixed price. The contract, however, recited that the vendor could not, at the time, make a clear title and it was, therefore, stipulated that, in the meantime, the vendor should lease the road to the purchaser. The provisions in relation to the sale and to the lease were kept distinct throughout the contract. It was held that, prior to the time when title could be transferred, the relations of the corporations were those of lessor and lessee, and that, even if the contract of sale was *ultra vires*, the lease was valid. *United States Trust Co. v. Mercantile Co.*, 88 Fed. 140 (1898).

A written agreement by which one railroad company grants to another the right, for a term of years, to maintain its track across the right of way of the former, upon payment of a nominal rental, is a lease, the covenants of which run with the land. *Louisville, etc. R. Co. v. Illinois, etc. R. Co.*, 174 Ill. 448 (1898), (51 N. E. Rep. 824).

A contract, by which a telegraph company grants to another the privilege of stringing wires on its telegraph poles, is not a lease of the corporation's property, within the meaning of a statute providing that leases of corporate property can be made only when sanctioned by holders of three-fifths of the stock. *Farnsworth v. Western Union Tel. Co.*, 53 Hun (N. Y.), 636 (1889), (6 N. Y. Supp. 735).

As to whether a particular agreement was a "contract" or lease, see *Archer v. Terre Haute, etc. R. Co.*, 102 Ill. 492 (1882), (7 Am. & Eng. R. Cas. 255). See also *Wiggins Ferry Co. v. Ohio, etc. R. Co.*, 142 U. S. 396 (1891), (12

The elements essential to the existence of a valid railroad lease are as follows :

- (1) A grant of authority by the State to both lessor and lessee corporations.
- (2) The assent of the stockholders of both corporations.
- (3) A written instrument stating the term and rent.
- (4) Its formal execution.

§ 176. **Distinction between Relation of Lessor and Lessee and other Intercorporate Relations.** — The distinction between a contract of lease entered into by railroad corporations and their consolidation has already been pointed out.¹ The difference between the relation of lessor and lessee and other intercorporate relations is, generally, obvious.

Contracts for the joint use of railroad property are, however, analogous to leases and some difficulty has arisen in distinguishing between them. The point of difference is that a lease conveys an estate in, and the possession of, the property constituting its subject-matter, while a trackage contract or terminal privilege carries with it no interest in the property and no right to its exclusive possession.²

II. *Legislative Authority for Lease of Railroad.*

§ 177. **Lease of Railroad invalid without Legislative Authority.** — Upon principles elsewhere considered, a *quasi*-public corporation cannot transfer, absolutely or for a limited period, its franchises, or the property necessary for the performance of its public duties, without legislative authority.³ A lease of a railroad, in the absence of a statute authorizing it, is *ultra vires* and against public policy.⁴

Sup. Ct. Rep. 188); South Carolina, etc. R. Co. v. Augusta, etc. R. Co., 107 Ga. 164 (1899), (33 S. E. Rep. 36).

¹ See ante, § 14: "Distinction between Consolidation and Lease."

² See post, § 255: "Nature of a Trackage Contract."

³ See ante, §§ 17-18: "Necessity for Legislative Authority" (consolidation);

ante, §§ 135-139: "*Legislative Authority for Sale of Franchises.*"

⁴ I. Cases holding Unauthorized Railroad Lease invalid because *ultra vires*.

United States: St. Louis, etc. R. Co. v. Terre Haute, etc. R. Co., 145 U. S. 393 (1892), (12 Sup. Ct. Rep. 953); Central Transp. Co. v. Pullman Car Co., 139 U. S. 24 (1891), (11 Sup. Ct. Rep. 478); Pittsburgh, etc. R. Co. v.

In *Pennsylvania R. Co. v. St. Louis, etc. R. Co.*¹ Mr. Justice Miller thus applied the principle of *ultra vires* to rail-

Keokuk Bridge Co., 131 U. S. 371 (1889), (9 Sup. Ct. Rep. 770); *Oregon R., etc. Co. v. Oregonian Co.*, 130 U. S. 1 (1889), (9 Sup. Ct. Rep. 409); *Pennsylvania R. Co. v. St. Louis, etc. R. Co.*, 118 U. S. 290 (1886), (6 Sup. Ct. Rep. 1094); *Thomas v. Railroad Co.*, 101 U. S. 71 (1879), (leading case); *Hamilton v. Savannah, etc. R. Co.*, 49 Fed. 412 (1892).

Alabama: *Memphis, etc. R. Co. v. Grayson*, 88 Ala. 572 (1889), (7 So. Rep. 122, 43 Am. & Eng. R. Cas. 681).

Indiana: *Commissioners of Tippecanoe Co. v. Lafayette, etc. R. Co.*, 50 Ind. 85 (1875).

Massachusetts: *Middlesex R. Co. v. Boston, etc. R. Co.*, 115 Mass. 347 (1874).

Montana: *State v. Montana R. Co.*, 21 Mont. 221 (1898), (53 Pac. Rep. 623).

Nebraska: *State v. Atchison, etc. R. Co.*, 24 Neb. 143 (1888), (8 Am. St. Rep. 164, 38 N. W. Rep. 43).

New Hampshire: *Dow v. Northern R. Co.*, 67 N. H. 1 (1886), (36 Atl. Rep. 510).

New Jersey: *Black v. Delaware, etc. Canal Co.*, 24 N. J. Eq. 454 (1873).

New York: *Abbott v. Johnstown, etc. Horse R. Co.*, 80 N. Y. 27 (1880), (36 Am. Rep. 572); *Troy, etc. R. Co. v. Kerr*, 17 Barb. (N. Y.) 581 (1854); *Gere v. New York Central, etc. R. Co.*, 19 Abb. N. C. 193 (1885).

England: *East Anglian R. Co. v. Eastern Counties R. Co.*, 11 C. B. (o. s.) 775 (1851); *Simpson v. Denison*, 10 Hare, 51 (1852), (16 Jur. 828).

II. *Cases holding Unauthorized Railroad Lease invalid because against Public Policy.*

United States: *Thomas v. Railroad Co.*, 101 U. S. 71 (1879); *Earle v. Seattle, etc. R. Co.*, 56 Fed. 909 (1893).

Compare, however, Pittsburgh, etc. R. Co. v. Columbus, etc. R. Co., 8 Biss. 456 (1879).

Georgia: *Singleton v. Southwestern R. Co.*, 70 Ga. 464 (1883), (48 Am. Dec. 574).

Illinois: *Wabash, etc. R. Co. v. Payson*, 106 Ill. 534 (1883).

Massachusetts: *Braslin v. Somerville Horse R. Co.*, 145 Mass. 64 (1887), (13 N. E. Rep. 65): "The general rule is familiar, that neither a steam nor a street railway corporation can make a valid transfer, either by way of absolute deed, mortgage or lease, of its franchise, or of its railroad and bulk of its property, or relieve itself of the burdens imposed upon it by law, or by its charter, without the consent of the State."

Minnesota: *Freeman v. Minneapolis, etc. R. Co.*, 28 Minn. 443 (1881), (10 N. W. Rep. 594).

New Jersey: A corporation created by statute possesses no rights, and can exercise no powers, which are not expressly given or necessarily implied. Such a corporation cannot lease or dispose of any franchise needful in the performance of its obligations to the State, without legislative consent. *Stockton v. Central R. Co.*, 50 N. J. Eq. 52 (1892), (24 Atl. Rep. 964). Also *Mills v. Central R. Co.*, 41 N. J. Eq. 1 (1886), (2 Atl. Rep. 453); *Black v. Delaware, etc. Canal Co.*, 22 N. J. Eq. 130 (1871); s. c. 24 N. J. Eq. 454 (1873).

Pennsylvania: *Van Steuben v. Central R. Co.*, 178 Pa. St. 367 (1896), (35 Atl. Rep. 992).

South Carolina: *Harmon v. Columbia, etc. R. Co.*, 28 S. C. 401 (1887), (5 S. E. Rep. 835, 13 Am. St. Rep. 686).

Texas: *International, etc. R. Co. v. Moody*, 71 Tex. 614 (1888), (9 S. W. Rep. 465); *Gulf, etc. R. Co. v. Morris*, 67 Tex. 692 (1887), (4 S. W. Rep. 156);

¹ *Pennsylvania R. Co. v. St. Louis, etc. R. Co.*, 118 U. S. 309 (1886), (6 Sup. Ct. Rep. 1094).

road leases: "We think it may be stated, as the just result of these cases and on sound principle, that, unless specially authorized by its charter or aided by some other legislative action, a railroad company cannot, by lease or any other contract, turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchises, and the exercise of its powers; nor can any other railroad company, without similar authority, make a contract to receive and operate such road, franchises, and property of the first corporation, and that such a contract is not among the ordinary powers of a railroad company, and is not to be presumed from the usual grant of powers in a railroad charter."

And in the earlier case of *Thomas v. Railroad Co.*¹ the same Justice, after discussing the doctrine of *ultra vires*, said: "There is another principle of equal importance and equally conclusive against the validity of this contract, which, if not coming exactly within the doctrine of *ultra vires* as we have just discussed it, shows very clearly that the railroad company was without the power to make such a contract. That principle is that where a corporation, like a railroad company, has granted to it by charter a franchise intended, in large measure, to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the

Central, etc. R. Co. v. Morris, 68 Tex. 49 (1887), (3 S. W. Rep. 457).

Vermont: Nelson v. Vermont, etc. R. Co., 26 Vt. 717 (1854).

Virginia: Roper v. McWhorter, 77 Va. 214 (1883).

West Virginia: Ricketts v. Chesapeake, etc. R. Co., 33 W. Va. 433 (1890), (10 S. E. Rep. 801): "We think it may be stated, as the just result of the decided cases, and on sound principle, that a railroad corporation cannot, without distinct legislative authority, by lease, or any other contract, turn over to another company its road and the use of its franchises, and thereby exempt itself from responsibility for the conduct

and management of the road." Also *Fischer v. West Virginia R. Co.*, 39 W. Va. 366 (1894), (9 S. E. Rep. 578).

England: An agreement between two railway companies, made without the authority of the legislature, whereby one company delegates to another all the powers which have been conferred upon it by parliament, is an unlawful attempt to effect that which parliament alone can authorize, and is against public policy. Great Northern R. Co. v. Eastern Counties R. Co., 12 Eng. L. & Eq. 224 (1851), 9 Hare, 306.

¹ *Thomas v. Railroad Co.*, 101 U. S. 83 (1879).

consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy."

§ 178. **Necessity for Legislative Authority to take a Lease.**—Legislative authority is as necessary to take as to make a lease. A railroad company, unless expressly authorized, has no power to accept a lease of the railroad and franchises of another corporation. Such an act, unauthorized, is both *ultra vires* and opposed to public policy. One corporation cannot assume the performance of the public duties of another unless the State approve.

If either party to a lease of a railroad is acting without authority, it is void. A contract beyond the powers of either is as invalid as if beyond the powers of both.¹

§ 179. **Legislative Ratification of Unauthorized Lease.**—While legislative authority is essential to the validity of a lease of a railroad it is not necessary that it should be granted *before* the execution of the lease. The legislature may cure invalidity by subsequent ratification, and when ratified, a contract stands as if authorized in the first instance.² Thus, a

¹ *St. Louis, etc. R. Co. v. Terre Haute, etc. R. Co.*, 145 U. S. 404 (1892), (12 Sup. Ct. Rep. 953); *Central Transp. Co. v. Pullman Car Co.*, 139 U. S. 24 (1891), (11 Sup. Ct. Rep. 478); *Pittsburgh, etc. R. Co. v. Keokuk, etc. Bridge Co.*, 131 U. S. 371 (1889), (9 Sup. Ct. Rep. 770); *Oregon R., etc. Co. v. Oregonian R. Co.*, 130 U. S. 36 (1889); *Pennsylvania Co. v. St. Louis, etc. R. Co.*, 118 U. S. 310 (1886), (6 Sup. Ct. Rep. 1094); *Thomas v. Railroad Co.*, 101 U. S. 82 (1879); *Rogers v. Nashville, etc. R. Co.*, 91 Fed. 316 (1898). Also *Louisville, etc. R. Co. v. Kentucky*, 161 U. S. 691 (1896), (16 Sup. Ct. Rep. 714); *Winch v. Birkenhead, etc. R. Co.*, 16 Jur. 1035 (1835). And see *ante*, § 139: "*Legislative Authority essential to Purchase of Franchises*;" *ante*, § 144: "*Seller must have Authority to sell and Buyer to buy.*"

² *Terre Haute, etc. R. Co. v. Cox*, 102 Fed. 825 (1900). See also the

following cases of mortgages and consolidations without authority made binding by subsequent legislative ratification which involve principles applicable to cases of leases.

United States: *Graham v. Boston, etc. R. Co.*, 118 U. S. 161 (1886), (6 Sup. Ct. Rep. 1009); *Gross v. U. S. Mortgage Co.*, 108 U. S. 447 (1883), (2 Sup. Ct. Rep. 940); *Galveston R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459 (1870); *Whitewater, etc. Canal Co. v. Valette*, 21 How. (U. S.) 414 (1858); *Hall v. Sullivan R. Co.*, 11 Fed. Cas. 257 (1857), (2 Redfield Am. Ry. Cas. 621, 21 Law Rep. 138).

Illinois: *U. S. Mortgage Co. v. Gross*, 93 Ill. 483 (1879), (s. c. 108 U. S. *supra*); *Mitchell v. Deeds*, 49 Ill. 416 (1867); *Racine, etc. R. Co. v. Farmers Loan, etc. R. Co.*, 49 Ill. 331 (1868); *Hatcher v. Toledo, etc. R. Co.*, 62 Ill. 477 (1872), (6 Am. R. Rep. 405).

Maine: *Kennebec, etc. R. Co. v.*

lease of a railroad and franchises, unauthorized when made either by the corporation's articles of incorporation or by statute, was held to be validated by an act of the legislature, subsequently passed, conferring such authority.¹

Legislative ratification must be clearly expressed. A reference to "lessees," in an act regulating rates of fare upon a railroad operated under an unauthorized lease, does not validate it. "It is not by such an incidental use of the word 'lessees' . . . that a contract, unauthorized by the charter and forbidden by public policy, is to be made valid and ratified by the State."²

Ratification by the legislature must be distinguished from ratification by stockholders. The stockholders of a corporation may ratify an irregularity in the exercise of granted powers; the State alone can make good an act beyond the scope of those powers.³

§ 180. **What Railroads may be leased. Statutory Provisions.**—The power to lease railroads is, in many cases,

Portland, etc. R. Co., 59 Me. 1 (1871); Shepley v. Atlantic, etc. R. Co., 55 Me. 395 (1868).

Massachusetts: Shaw v. Norfolk County R. Co., 5 Gray 162 (1855).

New Hampshire: Richards v. Merimack, etc. R. Co., 44 N. H. 127 (1862).

See ante, § 20: "*Legislative Sanction—how expressed.*"

¹ Terre Haute, etc. R. Co. v. Cox, 102 Fed. 825 (1900). In this case Judge Grosscup said: "From the moment the act was passed the two railway companies had the power to enter into a lease containing provisions such as are here sought to be enforced. Thenceforth such power existed under the laws of Indiana. Had the two companies, at any time thereafter, formally adopted the lease, under the act giving authority, no one would insist that the lease was *ultra vires*. An adoption of the lease, otherwise unauthorized, under an act conferring authority, must be distinguished from an attempted ratification without any new

statutory authority. In the one case the law is changed so that the contemplated agreement is no longer unlawful; in the other the contemplated ratification, if held valid, would, in effect, substitute, on the question of power, the will of the corporation for the will of the legislature. But an adoption of the agreement embodied in the lease, in the light of the new power conferred, may be implied from conduct, as well as from a formal act of readoption. . . . It is not an attempted over-reaching of the law, by the ratification of an unauthorized act; but is, in effect, a readjustment of the companies' relations to the powers conferred by the new legislative authority."

² Thomas v. Railroad Co., 101 U. S. 85 (1879). See also Oregon R., etc. Co. v. Oregonian R. Co., 130 U. S. 1 (1889), (9 Sup. Ct. Rep. 409).

³ Louisville, etc. R. Co. v. Louisville Trust Co., 174 U. S. 552 (1899), (19 Sup. Ct. Rep. 817), and cases cited.

granted in conjunction with a grant of power to sell them. Divers statutes of this character are included in the summary printed in connection with the subject of sales of railroads. Other statutes relating only to railroad leases are collected in the footnote.¹

¹ *Alabama.* See *ante*, § 145 ("Sales").

Arizona. Code 1896, § 1171: "Any railroad company incorporated by the laws of any other State and now owning or which is authorized to own or operate, by lease or otherwise, any railroad in this State," may "aid any railroad company incorporated under any . . . law of this State . . . by leasing . . . any such railroad, on such terms as may be agreed upon by the respective boards of directors." See also *ante*, § 145 ("Sales").

Arkansas. See *ante*, § 145 ("Sales").

California. Pomeroy's Code 1901, § 473 (a): "Railroad corporations doing business in this State, and organized under the law of this State, or of the United States, or any other State or Territory thereof, have power to enter into contracts with one another whereby the one may lease of the other the whole or any part of its railroad."

Colorado. See *ante*, § 145 ("Sales").

Connecticut. G. S. 1888, § 3472: "Any railroad company may make lawful contracts with any other railroad company with whose railway its tracks may connect or intersect . . . and may take a lease of the property or franchises of, or lease its property or franchises to, any such railway company."

Florida. See *ante*, § 145 ("Sales").

Georgia. See *ante*, § 145 ("Sales").

Idaho. See *ante*, § 145 ("Sales").

Iowa. See *ante*, § 145 ("Sales").

Kansas. G. S. 1897, ch. 70, § 94: "Any railroad company shall have power to lease its road and appurtenances to any railroad corporation organized under the laws of this State, or any adjoining State, when the road so leased shall thereby become on the operation thereof a continuation and

extension of the road of the company accepting such lease." For additional statutes see *ante*, § 145 ("Sales").

Maine. See *ante*, § 145 ("Sales").

Maryland. See *ante*, § 145 ("Sales").

Massachusetts. P. S. 1882, ch. 112, § 220: "Two railroad corporations created by this Commonwealth, whose roads enter upon or connect with each other . . . ; and any such corporation may lease its road to any other such corporation." This section does not authorize a lease between two corporations, each of which has a terminus in Boston.

Ib. § 221: "The roads of two railway companies shall be deemed to enter upon or connect with each other . . . if one of such roads enters upon, connects with, or intersects a road leased to the other, or operated by it under a contract."

Ib. § 222. "No railroad shall lease . . . its road for a period of more than ninety-nine years."

Michigan. See *ante*, § 145 ("Sales").

Minnesota. See *ante*, § 145 ("Sales").

Mississippi. Code 1892, § 3577: "Every railroad corporation organized under the provisions of this chapter shall have and exercise the following powers, rights, and privileges, viz:—"

(*Ib.* § 3588.) "To lease its railroad and all its property and franchises, rights, powers, privileges, and immunities then owned or thereafter to be acquired, or to lease other railroads, in or out of this State, not in either case parallel or competing lines, for a term of years."

Missouri. See *ante*, § 145 ("Sales").

Montana. See *ante*, § 145 ("Sales").

Nebraska. See *ante*, § 145 ("Sales").

New Hampshire. Pub. Stat. & Sess. Laws 1901, ch. 156, § 21, p. 503: "Any

These statutes, as a general rule, limit the right to make and take leases to railroad companies owning or operating connecting lines.

railroad corporation may lease its railroad . . . to any other railroad corporation for such a length of time and upon such terms as may be agreed to by the lessor and lessee corporations at meetings of their respective stockholders . . . by a two-thirds vote of all the stock represented and voting at such meetings."

Ib. § 44, p. 506: Foreign corporations operating roads within this State shall have the same rights for the purpose of leasing other roads as if created by the laws of this State.

New Jersey. G. S. 1875, par. 55, p. 2651: "Any corporation incorporated under this act or under any of the laws of this State" may "lease its road . . . to any other corporation or corporations of this or any other State, but (*ib.* par. 312, § 1, p. 2709) "no company incorporated under the act entitled 'An act to authorize the formation of railroad corporations and to regulate the same . . . , or under any other law or charter enacted or granted by the legislature of this State, shall have power to lease its road or franchises . . . to any foreign corporation . . . until the consent of the legislature of this State shall have been first obtained."

Ib. par. 312, § 2, p. 2709 (as amended by ch. 137, p. 235, Laws 1898). If corporation desires to execute lease it may execute . . . it by contract, which contract shall be approved by two-thirds of the stockholders, given in writing or by vote. But consent of legislature must be obtained.

Laws 1898, ch. 150, p. 355, provides that railroads may acquire branch lines to manufactories, quarries, etc., not exceeding two miles in length.

New Mexico. Comp. Laws 1897, § 3847: Every corporation formed under this act shall have the following powers: (15) "To lease the whole or any portion of its railroad . . . to any

other corporation formed under this act or . . . under the laws of any other State or Territory, with the road of which its road may connect and form a continuous line of travel and transportation." (16) "To take leases of such other railroads . . . as are mentioned in the last preceding subdivision of this section."

For additional statutes, see *ante*, § 145 ("Sales").

New York. R. S. 1901 (Birdseye's) Railroad Law, § 78: "Any railroad corporation or any corporation owning or operating a railroad route within this State may contract with any other such corporation for the use of their respective roads or routes . . . in such manner . . . as prescribed . . . in such contract . . . and if such contract shall be a lease of any such road, and for a longer period than one year," it shall not be binding "unless approved by the votes of stockholders owning at least two-thirds of the stock of each corporation which is represented and voted upon in person or by proxy at a meeting called separately for that purpose."

North Carolina. Laws 1885, ch. 108, p. 159, § 2: "Any railroad . . . may lease any railroad or branch railroad . . . in this or any adjoining State connecting with it, directly or indirectly."

North Dakota. See *ante*, § 145 ("Sales").

Ohio. Bates' Anno. Stat. (1787-1902), § 3384 (a): "Any consolidated company . . . of this State or any other State, may . . . lease . . . any railroad . . . of this State or of any other State, if the line of road covered by such lease . . . is connected with the line of road of such consolidated railroad company, upon such terms as may be agreed upon between the companies."

For additional statute, see *ante*, § 145 ("Sales").

Oklahoma. See *ante*, § 145 ("Sales").

Oregon. See *ante*, § 145 ("Sales").

Power to take a lease of a railroad within the State is generally conferred indiscriminately upon domestic and for-

Pennsylvania. Bright *Purd. Dig.* 1894, § 153, p. 1810: (Act of March 13, 1847), relates to the running of cars on connecting railways.

Ib. § 154, p. 1810: The act of March 13, 1847, "shall be so construed as to authorize companies owning any connecting railroads in the State of Pennsylvania to enter into any lease . . . with each other."

Ib. § 156, p. 1810: "It shall be lawful for any railroad companies to enter into contracts for the use or lease of any other railroads upon such terms as may be agreed upon. . . . Provided, that the roads of the companies so contracting or leasing shall be directly, or by means of intervening railroads, connected with each other."

Ib. § 169, p. 1812: "Any railroad company or companies . . . of this Commonwealth" may "lease or become the lessees, by assignment or otherwise, of any railroad or railroads . . . whether the road or roads embraced in such lease . . . may be within the limits of this State, or created by or existing under the laws of any other State or States . . . Provided, however, that the road or roads, so embraced in any such lease . . . shall be connected, either directly, or by means of an intervening line, with the railroad or railroads of said company or companies of this Commonwealth so entering into such lease . . . and thus forming a continuous route or routes for the transportation of persons and property."

South Carolina. See *ante*, § 145 ("Sales").

South Dakota. See *ante*, § 145 ("Sales").

Tennessee. Code 1896, § 1538: "Any railroad company owning any main line may contract with any company owning a railroad connecting with such main line for the lease thereof."

For additional statutes, see *ante*, § 145 ("Sales").

Texas. Sayles' *Civ. Stat.* 1897 (Supp.

to 1900), vol. 2, ch. 15 a (Acts 1899, p. 73): "Any railroad now or hereafter constructed, not exceeding thirty miles in length, connected at or near the State line with any other railroad, may be leased by the company owning such other railroad" for not exceeding ten years.

Utah. Laws 1901, ch. 26, p. 23, § 7: "Any railroad . . . of this State may lease and operate. . . a railroad owned by any other company within or without this State; and any railroad . . . of the United States, or of any State or Territory, may lease and operate . . . the railroad owned by a company of this State."

This act does not permit leasing of competing lines.

For additional statute, see *ante*, § 145 ("Sales").

Vermont. Stat. 1894, § 3747: "Railroad companies in this State may make contracts and arrangements with each other, and with railroad corporations . . . of other of the United States, or . . . of the Dominion of Canada, for leasing and running the roads of the respective corporations, or a part thereof."

Washington. See *ante*, § 145 ("Sales").

West Virginia. Code 1899, ch. 54, § 53 (as amended by Acts 1901, ch. 108): Same as "Consolidation" statute (*ante*, § 22), substituting "lease" for "consolidate."

Ib. § 82 a: "Any railroad company may . . . lease its road to any other railroad within this State," but not to a parallel or competing line.

Wisconsin. See *ante*, § 145 ("Sales").

Wyoming. See *ante*, § 145 ("Sales").

England. "The Railway Leasing Act," 8 & 9 Vict. c. 96 (1845), provides that no railway company shall grant or accept a lease or transfer of any railway unless under a distinct provision of an Act specifying the parties.

eign corporations; although in New Jersey a lease to a foreign corporation cannot be executed until the consent of the legislature has been obtained and in Massachusetts the right is limited to domestic corporations.

The term for which leases of railroads may be taken is generally unlimited. In Massachusetts, however, it cannot exceed ninety-nine years.

The English "Railway Leasing Act," which forbids the lease of any railway "unless under a distinct provision of an Act specifying the parties" seems to be a "leasing act" in the negative.

§ 181. **Rule of Construction of Statutes.** — A statute granting powers to a corporation is construed strictly, against the grantee and in favor of the public. In grants by the public everything must be expressed; nothing passes by implication.¹ The intention of the legislature to authorize a railroad company to lease its railroad and franchises must clearly appear or the power will not exist.² In case of doubt, a construction

¹ *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420 (1837); *Dubque, etc. R. Co. v. Litchfield*, 23 How. (U. S.) 66 (1859); *Turnpike Co. v. Illinois*, 96 U. S. 63 (1877); *Slidell v. Grandjean*, 111 U. S. 412 (1884), (4 Sup. Ct. Rep. 475); *Oregon R., etc. Co. v. Oregonian R. Co.*, 130 U. S. 1 (1889), (9 Sup. Ct. Rep. 409).

In *Central Transp. Co. v. Pullman Car Co.*, 139 U. S. 24 (1891), (11 Sup. Ct. Rep. 478), the Supreme Court of the United States said: "By a familiar rule, every public grant of property, or of privileges or franchises, if ambiguous, is to be construed against the grantee and in favor of the public; because an intention, on the part of the government, to grant to private persons, or to a particular corporation, property or rights in which the whole public is interested, cannot be presumed, unless unequivocally expressed or necessarily to be implied in the terms of the grant, and because the grant is supposed to be made at the solicitation of the grantee, and to be drawn up by him or by his

agents, and therefore the words used are to be treated as those of the grantee; and this rule of construction is a wholesome safeguard of the interests of the public against any attempt of the grantee, by the insertion of ambiguous language, to take what could not be obtained in clear and express terms."

² *United States v. Central Transportation Co. v. Pullman Car Co.*, 139 U. S. 24 (1891), (11 Sup. Ct. Rep. 478); *Oregon R., etc. Co. v. Oregonian R. Co.*, 130 U. S. 1 (1889), (9 Sup. Ct. Rep. 409); *Pennsylvania Co. v. St. Louis, etc. R. Co.*, 118 U. S. 290 (1886), (6 Sup. Ct. Rep. 1094).

Nebraska v. State v. Atchison, etc. R. Co., 24 Neb. 143 (1888), (38 N. W. Rep. 43, 8 Am. St. Rep. 164).

New Jersey: In *Black v. Delaware etc. Canal Co.*, 22 N. J. Eq. 130 (1871), the Chancellor distinguished between a primary grant of franchises and an act authorizing the transfer of existing franchises, holding that the latter did not require the same strict rule of construction applicable in the case of the

will not be given which will authorize a *quasi*-public corporation to disable itself from performing the duties for which it was created. In fact, it has been said that to justify a railroad company in claiming authority to lease its railroad to another corporation "it must be able to point to the exact statute granting such authority."¹

The correct rule is, undoubtedly, that grants are to be strictly construed, but that the intention of the legislature is not to be defeated by an unreasonably strict construction.²

§ 182. **Construction of Statutes — (A) Provisions Authorizing Leases.** — An Illinois statute³ authorizing domestic railroad companies to make "contracts and arrangements with each other, and with railroad corporations of other States, for leasing and running their roads, or any part thereof," has been held by the Supreme Court of the United States to include, by the use of the words "their roads," not only roads of other domestic but foreign corporations and to confer power to make, as well as to take, leases.⁴ Power to construct a branch railroad will carry with it by implication power to lease a branch already constructed, but such power cannot be exercised after the right to construct has expired. The loss

former. This distinction, however, was not approved by the appellate court, and cannot be justified in principle. 24 N. J. Eq. 455 (1873).

Texas: East Line, etc. R. Co. v. State, 75 Tex. 434 (1889), (12 S. W. Rep. 690).

¹ *State v. Atchison, etc. R. Co.*, 24 Neb. 161 (1888), (38 N. W. Rep. 43, 8 Am. St. Rep. 164).

² See *ante*, § 27: "General Rule of Construction" (consolidation); *ante*, § 146: "Construction of Statutes" (sales).

³ *Illinois*: Statute of February 12, 1855; Priv. Laws 1885, p. 304; Rev. Stat. 1874, ch. 114, § 34.

⁴ *St. Louis, etc. R. Co. v. Terre Haute R. Co.*, 145 U. S. 393 (1892), (12 Sup. Ct. Rep. 953). Compare *Black v. Delaware, etc. Canal Co.*, 22 N. J. Eq. 130 (1871), reversed in 24 N. J. Eq. 455 (1873).

Authority granted to a railroad corporation to lease a railroad connected with its own does not permit it to lease its own road to another company. *Mills v. Central R. Co.*, 41 N. J. Eq. 1 (1886), (2 Atl. Rep. 453).

A statute conferring authority upon a railroad company to lease its property is confined, in its operation, to property within the State. *Briscoe v. Southern Kansas R. Co.*, 40 Fed. 273 (1889).

A Massachusetts statute authorizing "any railroad corporation created by this State" to lease its road to another corporation "so created" authorizes the making of a lease by a corporation formed by a consolidation of a domestic corporation with a corporation of another State; the consolidated company being in Massachusetts a corporation of that State. *Peters v. Boston, etc. R. Co.*, 114 Mass. 127 (1873).

of the right involves the deprivation of all powers flowing from it.¹

Power to "farm out" the right of transportation has been held by the Supreme Court of North Carolina to be equivalent to power to lease.² This is incorrect. The phrase "to farm out" is an English one and, as applied to railroads, merely means the grant of running privileges.

When a corporation is authorized to take a lease of a railroad and franchises it may acquire the same through an assignment of the lease from an existing lessee.³

The New York statute of 1839⁴ providing that "it shall be lawful for any railroad corporation to contract with any other railroad corporation for the use of their respective roads and thereafter to use the same in the manner prescribed in said contract" has been repeatedly held by the courts of that State to authorize a lease. As said by Judge Gray in *Beveridge v. New York Elevated R. Co.*⁵: "The act of 1839 has more than once been construed to authorize such a lease. The power therein conferred upon a railroad corporation to contract with another for the use of their respective roads, in such manner as the contract may prescribe, involves the power to make a lease for a term of years."⁶

§ 183. Construction of Statutes — (B) Provisions not authorizing Leases. — In contrast to the construction of the New York statute referred to in the last section, an Indiana statute⁷ authorizing a domestic railroad company "to make such con-

¹ *Camden, etc. R. Co. v. May's Landing, etc. R. Co.*, 48 N. J. L. 530 (1886), (7 Atl. Rep. 523).

² *State v. Richmond, etc. R. Co.*, 72 N. C. 634 (1875).

³ *Stewart v. Long Island R. Co.*, 102 N. Y. 601 (1886), (8 N. E. Rep. 200).

⁴ Laws of 1839, ch. 218.

⁵ *Beveridge v. New York Elevated R. Co.*, 112 N. Y. 21 (1889), (19 N. E. Rep. 489).

⁶ See also *Day v. Ogdensburgh, etc. R. Co.*, 107 N. Y. 129 (1887), (13 N. E. Rep. 765); *Woodruff v. Erie R. Co.*, 93 N. Y. 609 (1883); *People v. Albany, etc. R. Co.*, 77 N. Y. 232 (1879); *Fisher*

v. New York Central, etc. R. Co., 46 N. Y. 644 (1871); *Gere v. New York Central, etc. R. Co.*, 19 Abb. N. C. 193 (1885). Compare *Troy, etc. R. Co. v. Boston, etc. R. Co.*, 86 N. Y. 107 (1881), where Judge Danforth said concerning the act of 1839: "Assuming that the statute permits a grant of the exclusive right to use a road, and does not contemplate a mere traffic arrangement, by which each of two companies may use the other's road, is the instrument called a lease, a contract for 'use,' within its meaning?"

⁷ *Indiana Rev. Stat.* (1881), § 3973.

tracts and agreements" with a connecting railroad in an adjoining State "for the transportation of freight and passengers, or for the use of its said road, as to the board of directors may seem proper," was held by the Supreme Court of the United States not to confer authority to make contracts beyond those relating to forwarding passengers and freight, and, possibly, to the use of the road of the one company by the other in running its cars to their destination.¹ The title to this act included the clause, "to connect their roads with the roads of other companies," and the Supreme Court of Indiana, in construing the act, said: "To connect one road with another does not fairly mean to lease or sell it to another."²

A provision in the charter of a railroad corporation authorizing it "to make contracts and engagements with any other corporation, or with individuals, for transporting or conveying any kinds of goods, produce, merchandise, freight or passengers," merely authorizes contracts relating to the carriage of goods or passengers and cannot be construed as authorizing a lease.³ A statute authorizing a corporation to contract with other corporations "for the leasing or hiring and transfer to

¹ *Pennsylvania Co. v. St. Louis, etc. R. Co.*, 118 U. S. 311 (1886), (6 Sup. Ct. Rep. 1094); *St. Louis, etc. R. Co. v. Terre Haute R. Co.*, 145 U. S. 405 (1892), (12 Sup. Ct. Rep. 593); *Commissioners of Tippecanoe County v. Lafayette, etc. R. Co.*, 50 Ind. 85 (1875).

² *Commissioners of Tippecanoe County v. Lafayette, etc. R. Co.*, 50 Ind. 110 (1875), (per Biddle, J.).

³ *Thomas v. Railroad Co.*, 101 U. S. 80 (1879):

"The authority to make this lease is placed by counsel primarily in the following language of the thirteenth section of the company's charter: 'That it shall be lawful for the said company, at any time during the continuance of its charter, to make contracts and engagements with any other corporation, or with individuals, for the transporting or conveying of any kinds of goods, produce, merchandise, freight, or passengers, and to enforce the fulfilment of such contracts.' This is no more

than saying, 'you may do the business of carrying goods and passengers, and may make contracts for doing that business. Such contracts you may make with any other corporation or with individuals.' No doubt a contract by which the goods received from railroad or other carrying companies should be carried over the road of this company, or by which goods or passengers from this road should be carried by other railroads, whether connecting immediately with them or not, are within this power, and are, probably, the main object of the clause. But it is impossible, under any sound rule of construction, to find in the language used a permission to sell, lease, or transfer to others the entire road and the rights and franchises of the corporation. To do so is to deprive the company of the power of making those contracts which this clause confers and of performing the duties which it implies."

them" of its "railway cars and other personal property" authorizes the lease of such cars in the regular course of business but does not warrant the corporation in making a long lease to a single corporation of its entire personal property.¹

The use of the words "assigns" and "successors," in connection with the powers granted to railroad companies in their charters, or in general laws, does not necessarily imply that they may transfer all their property by lease. The use of such words recognizes the possibility of a transfer under statutory authority but does not, itself, grant the authority.² The phrase "passing over," as used in the English Railway Clauses Act,³ does not refer to a lease but means "passing, with the incidents which ordinarily attach to passing over, that is to say, the incidents of stopping and of taking up, at the points at which they do stop, both passengers and goods."⁴

A general incorporation act authorizing the formation of corporations for "any lawful purpose" does not authorize a corporation created thereunder to assume to itself the power to leasing railroads, because of the mere declaration in its articles of association that it possesses such power.⁵ A constitutional provision⁶ prohibiting parallel or competing roads from being consolidated is a restriction upon the powers of

¹ *Central Transp. Co. v. Pullman Palace Car Co.*, 139 U. S. 24 (1891), (11 Sup. Ct. Rep. 478).

² *Thomas v. Railroad Co.*, 101 U. S. 71 (1879); *Pennsylvania Co. v. St. Louis, etc. R. Co.*, 118 U. S. 311 (1886), (6 Sup. Ct. Rep. 1094); *Briscoe v. Southern Kan. R. Co.*, 40 Fed. 278 (1889). In *Oregon R., etc. Co. v. Oregonian R. Co.*, 130 U. S. 1 (1889), (9 Sup. Ct. Rep. 409), Mr. Justice Miller said: "One of the most important powers with which a corporation can be invested is the right to sell out its whole property together with the franchises under which it is operated, or the authority to lease its property for a long term of years. In the case of a railroad company, these privileges, next to the right to build and operate its railroad, would be the most important which could be given it, and this idea would impress itself upon the

legislature. Naturally, we would look for the authority to do these things in some express provision of law. We would suppose that if the legislature saw fit to confer such rights it would do so in terms which could not be misunderstood. To infer, on the contrary, that it either intended to confer them or to recognize that they already existed, by the simple use of the word 'assigns,' a very loose and indefinite term, is a stretch of the power of the court in making implications which we do not feel to be justified."

³ 8 Vict. ch. 20.

⁴ *Simpson v. Denison*, 10 Hare, 57 (1852), (16 Jur. 828).

⁵ *Oregon R., etc. Co. v. Oregonian R. Co.*, 130 U. S. 1 (1889), (9 Sup. Ct. Rep. 409).

⁶ *Texas, Const. Art. X. § 5.*

the corporations owning such roads, and is not to be construed as a grant of authority to non-competing corporations to lease.¹

§ 184. *Construction of Statutes — (C) Power to lease Unfinished Road.* — Power to construct does not give power to take a lease, and conversely, power to take a lease does not give power to construct.² Where, therefore, the statute authorizing railroad leases is inapplicable to roads not yet constructed, a lease by a railroad company of its road and franchises, before its road is completed, is invalid and the lessee acquires no right to finish the work.³ Thus it was held that a statute, authorizing the leasing of a railroad and conferring upon the lessee power “to run, use and operate” the road, implied a finished road, as did a condition that the leased roads should be connected; and that, under such authority, the franchise for building a road could not be transferred.⁴

While power to construct will not be implied from a grant of power to take a lease, power to enter into an executory contract for leasing, when completed, a railroad in process of construction, may fairly be implied from such a grant of power.⁵ The construction of a railroad requires the exercise of powers dissimilar to those required in the operation of a leased road. An agreement for a lease — or a lease to commence *in futuro* — involves merely the exercise in an uncommon form of the power conferred. As somewhat broadly stated by the Supreme Court of New Hampshire in *Jones v. Concord R. Co.*:⁶ “Whatever may be the practical effect of a conveyance or lease of a building or road that does not exist,

¹ *Central, etc. R. Co. v. Morris*, 68 Tex. 49 (1887), (3 S. W. Rep. 457).

² *Oregon R., etc. Co. v. Oregonian Co.*, 130 U. S. 1 (1889), (9 Sup. Ct. Rep. 409).

³ *Wood v. Bedford, etc. R. Co.*, 8 Phila. 94 (1871); *Clarke v. Omaha, etc. R. Co.* 4 Neb. 458 (1876), (sale).

⁴ *Wood v. Bedford, etc. R. Co.*, 8 Phila. 94 (1871).

⁵ *Jones v. Concord R. Co.*, 67 N. H. 234 (1892), (30 Atl. Rep. 614); *March v. Eastern R. Co.*, 40 N. H. 548 (1860);

Hazard v. Vermont, etc. R. Co., 17 Fed. 753 (1883). In *Day v. Ogdensburgh, etc. R. Co.*, 107 N. Y. 129 (1887), (13 N. E. Rep. 765), the road was finished in performance of an agreement entered into at the same time the lease was agreed upon, and it was held that the lease was valid — that the parties intended a completed road and before the lease was executed the road was completed.

⁶ *Jones v. Concord R. Co.*, 67 N. H. 243 (1892), (30 Atl. Rep. 614).

the corporate power of hiring a road, like the power of hiring a passenger or freight station, includes the power of making an executory contract for a lease of a road or building to be constructed within a time or in a place or manner or form, prescribed by the contract."

§ 185. **Construction of Statutes — (D) Leases of Connecting Lines.** — As already shown, statutes authorizing railroad leases generally provide that railroad companies may lease their roads to corporations owning roads which form continuous or connecting lines with their own.¹ The construction of statutes of this character has been the subject of extended consideration in connection with similar limitations attached to the right to consolidate, and the principles there shown to be established apply with equal force to statutes authorizing leases.²

§ 186. **Constitutional and Statutory Prohibitions of Leases of Competing or Parallel Lines.** — The leasing by railroad companies of competing or parallel lines of road is prohibited by constitutional and statutory provisions in many States.

The same and similar prohibitions, the considerations of public policy which induced their adoption, and their construction and application, have already been examined at length in the consideration of the subject of consolidation.³

§ 187. **Long Term Leases not Prohibited by Statutes against Perpetuities.** — The question has been judicially raised whether a lease in perpetuity or for nine hundred and ninety-nine years comes within the prohibition of statutes against perpetuities as suspending the disposition of the leased property longer than the periods prescribed in such statutes. A slight examination of the question, however, will show clearly that a lease does not create a perpetuity. A perpetuity was defined, in the early case of *Scattergood v. Edge*,⁴ to be an estate

¹ See ante, § 180: "*What Railroads may be leased. Statutory Provisions.*"

² See ante, § 29: "*Construction of Statutes authorizing Consolidation of Railroads — Connecting or Continuous Lines.*"

³ See ante, ch. 3: "*Constitutional and Statutory Restraints upon Consolidation.*"

The constitutional provisions against leases of competing lines — as well as consolidation and sales — are collected, and many statutes referred to, in note to § 32, ante: "*Constitutional and Statutory Provisions against Consolidation of Competing Railroads.*"

⁴ *Scattergood v. Edge*, 1 Salk. 229 (1795); In *Washburn v. Donnes*, 1 Ch.

“inalienable though all mankind joined in the conveyance.” But the interests of lessor and lessee may generally be separately conveyed; and they can, always, by uniting, freely and without restraint convey the entire estate — the fee and the leasehold interest.¹

CHAPTER XVII.

APPROVAL AND EXECUTION OF CONTRACT OF LEASE.

I. Assent of Stockholders to Railroad Lease.

- § 188. Necessity for Consent of Stockholders to Lease of Railroad. Power of Directors.
- § 189. Whether Unanimous Consent is necessary unless otherwise provided.
- § 190. Requisite Majority prescribe Terms of Lease.
- § 191. Remedies of Dissenting Stockholders.
- § 192. Acquiescence and Laches of Stockholders.

II. Method of Approving and Executing Railroad Leases.

- § 193. Statutory Requirements.
- § 194. Construction of Statutes prescribing Mode of Approving and Executing Leases.
- § 195. Formalities attending Execution of Lease of Railroad.
- § 196. Corporation may be estopped from alleging Irregular Execution of Lease.

I. Assent of Stockholders to Railroad Lease.

§ 188. **Necessity for Consent of Stockholders to Lease of Railroad. Power of Directors.** — The New York Court of Appeals has held that a lease by one railroad corporation to another of its road, property and franchises for a term of years, under a statute conferring the power but not prescribing its mode of exercise, may be made by the directors of the corporation, and that the concurrence of the stockholders is not essential to its validity.² The ground upon which this decision

Cas. 23 (1671), it is said: “A perpetuity is, where if all that have interest join and yet cannot bar or pass the estate.”

¹ *Todhunter v. Des Moines, etc. R.*

Co., 58 Iowa, 205 (1882), (12 N. W. Rep. 267, 7 Am. & Eng. R. Cas. 67), where the question stated in the text is considered.

² *Beveridge v. New York Elevated*

was placed was that all powers conferred upon a corporation, unless otherwise expressly prescribed, must be exercised by its directors, who are constituted by the law as the agency for the purpose; that the consent of stockholders is not necessary to the validity of a corporate act, unless expressly required by statute or the by-laws of the corporation. This conclusion is, however, opposed by other authorities and cannot be justified upon principle.

The directors of a corporation are its executive agents — the corporation acts through them — but their *duties are to administer its affairs in furtherance of the objects of its creation*.¹ They may exercise all ordinary and incidental corporate powers without the approval of the stockholders, but the extraordinary power of leasing the corporate property and franchises for a long term of years — of completely changing the control of the property and the administration of the affairs of the corporation — must be exercised by the stockholders themselves, unless expressly conferred upon the directors.²

R. Co., 112 N. Y. 1 (1889), (19 N. E. Rep. 489). See also *Conro v. Port Henry Iron Co.*, 12 Barb. (N. Y.) 27 (1851).

¹ The directors of a railroad company are its agents with limited powers and their duties are to so conduct its affairs as to further the ends of its creation; they have no power to destroy it or give away its funds or deprive it of any of the means for accomplishing the purposes for which it was chartered. *Bedford R. Co. v. Bowser*, 48 Pa. St. 29 (1864).

Where an increase of the capital stock of a corporation was authorized "at the pleasure of the said corporation" and its charter provided that "all the corporate powers of the said corporation shall be vested in and exercised by a board of directors" it was held that the directors had no authority to increase the stock, upon the ground that "the general power to perform all corporate acts refers to the ordinary business transactions of the corpora-

tion." *Railway Co. v. Allerton*, 18 Wall. (U. S.) 234 (1873).

² *United States v. Manchester, etc. R. Co.*, 9 Fed. 642 (1881), Judge McKennan, in considering the necessity for the stockholders' consent to a lease, said: "The change proposed here is not organic, it is true, but it is thorough and fundamental, as it affects the administration of the company's affairs. It involves a withdrawal from the control and management of the stockholders of the entire property of the corporation for a period of at least five years; it will preclude for a like period the exercise annually by the stockholders of their judgment as to the particular character and method of conducting the business affairs of the corporation; and it denies to the stockholders any right of suggestion or disapproval of the conditions upon which a relinquishment of important corporate faculties may be conceded. Surely a power which will be attended with such consequence does not relate 'to the

When the statute conferring power to lease is silent as to the mode of its exercise a lease of a railroad must be authorized, or, what is equivalent, ratified by the stockholders.

The right of the stockholders to authorize a lease, and the necessity for their approval, are in no way affected by the fact that the directors have agreed upon the terms of the lease.¹

§ 189. **Whether Unanimous Consent is necessary unless otherwise provided.** — As shown in another section, statutes authorizing leases of railroads nearly always prescribe the majority of stockholders whose consent is necessary. Where, however,

ordinary business transactions,' nor 'to the orderly and proper administration of the affairs,' of the company, and hence cannot be exercised by the directors without express authority to them.' "

Rogers v. Nashville, etc. R. Co., 91 Fed. 322 (1898): "The power of leasing out a railroad, or acquiring another by lease, is one which very vitally affects the contract between shareholders. That every such contract should be referred to the shareholders is, therefore, most reasonable; and it should not be lightly presumed that the law-making power would, when dealing with the general subject, intend to provide that some contracts of this character should be submitted to the shareholders for their approval, while others just as vital might be made without their consent." Also *Farmers Loan, etc. Co. v. St. Joseph, etc. R. Co.*, 1 McCrary 247 (1880).

Indiana: *Commissioners of Tipton County v. Lafayette, etc. R. Co.*, 50 Ind. 85 (1875).

New York: *Metropolitan El. R. Co. v. Manhattan El. R. Co.*, 11 Daly 373 (1884), (15 Am. & Eng. R. Cas. 55, 14 Abb. N. C. 103). In this case (decided before the *Beveridge* case *supra*) the Court said: "If the board of directors have the power, without the assent of the shareholders, to lease the properties of the corporation for all time, then the shareholders may be deprived of, not only the administration of their property through its agents, the directors,

but its very possession, without a moment's warning. A board of directors are elected for one year, to manage the business and affairs of the corporation, such business being the operating and maintaining of a railroad. At the time of their election, the shareholders have no intimation that anything else is to be done by the directors, and the expectation is that such directors, at the end of their year in office, will turn over the property committed to them to their successors in office, with an account of their stewardship. Can it be possible that this board, elected for only one year, without any notice or warning has the power to terminate the business of the corporation, and transfer all the properties to another corporation? It seems to me clearly not. This is not the management of the business of the corporation. It is terminating the business to carry on which it was incorporated."

Pennsylvania: *Kersey Oil Co. v. Oil Creek, etc. R. Co.*, 12 Phila. 374 (1877). Also *Martin v. Continental Pass. R. Co.*, 14 Phila. 10 (1880).

Virginia: *Stevens v. Davison*, 18 Gratt. 819 (1868).

See also *ante*, § 112: "*Sale of Entire Corporate Property by Directors.*"

It has been held that the consent of stockholders, necessary for the authorization of a lease, is required for its cancellation. *Henry v. Pittsburgh, etc. R. Co.*, 2 Ohio N. P. 118 (1895).

¹ *Jones v. Concord, etc. R. Co.*, 67 N. H. 234 (1892), (30 Atl. Rep. 614).

the statute contains no such provision, a question arises whether the unanimous consent of the stockholders is required or whether the consent of a majority is sufficient. Thus, on the one hand, it has been held that a lease for a long term of years works such a complete change in the conduct of the affairs of a corporation and the custody of its property that it can be brought about only by the unanimous consent of the stockholders.¹ On the other hand, it has been held that every stockholder, in joining a corporation, impliedly agrees to be bound by the will of the majority, and that it is the right of the majority to determine whether or not a lease — which makes no organic change — shall be made.² “It is true this doctrine,” says the Supreme Court of Maine,³ “subjects minorities to the will of majorities; but it is equally true that the contrary doctrine subjects majorities to the will of minorities; and since one side or the other must yield, it seems to us more in harmony with the principles of natural justice that it should be the minority.”

Upon principle, it seems the better view that, where authority to make or take a lease is expressly granted to an existing railroad company, and, *a fortiori*, where it appears in the laws under which the corporation is organized, the authority becomes a power of the corporation which, in the absence of a controlling statutory provision, may be exercised in the same manner as other powers requiring action by the stockholders — by a majority vote.⁴

¹ *Mills v. Central R. Co.*, 41 N. J. Eq. 1 (1886), (2 Atl. Rep. 453). See also *Zabriskie v. Hackensack, etc. R. Co.*, 18 N. J. Eq. 178 (1867).

In *Boston, etc. R. Co. v. New York, etc. R. Co.*, 13 R. L. 260 (1881), the Court said: “Such an arbitrary deprivation of property it cannot be within the power of a majority in a corporation to direct or of a legislature to ratify. If this could be upheld no investment in a corporation would be secure, for any minority could be deprived of their property by a vote of a majority confirmed by legislative act, without the requirement of public necessity and

without provision for “just compensation.”

² *Dickinson v. Consolidated Traction Co.*, 114 Fed. 234 (1902; *Inhabitants of Waldoborough v. Knox, etc. R. Co.*, 84 Me. 469 (1892), (24 Atl. Rep. 942) (sale). See also *Durfee v. Old Colony R. Co.*, 5 Allen (Mass.) 230 (1862).

³ *Inhabitants of Waldoborough v. Knox, etc. R. Co.*, 84 Me. 469 (1892), (24 Atl. Rep. 942).

⁴ *Dady v. Georgia, etc. R. Co.*, 112 Fed. 842 (1901), (case of consolidation). See *ante*, § 149: “*Assent of Stockholders. Whether Approval of Majority is sufficient.*”

§ 190. **Requisite Majority prescribe Terms of Lease.** — Where the charter of a corporation or a general law authorizes it, by a vote of a prescribed majority of its stockholders, to lease its property and franchises, and contains no restrictions as to the terms of the lease or the rent to be reserved, the majority may agree upon such provisions and rental as they see fit, and the minority stockholders have no remedy, except in case of fraud.

Thus, where the charter of a railroad corporation authorized it, without restriction, by a vote of three-fourths of its stockholders, to lease its railroad, it was held that a lease so entered into for ninety-nine years, at a rent not exceeding the amount needed to pay fixed charges and dividends on the preferred stock, was, in the absence of fraud, valid, although the possibility of any dividend being paid on the common stock was thereby excluded for the entire term.¹

The conclusion reached in the case referred to, while the logical outcome of the application of fixed principles to the provisions of the charter, was most inequitable. The rule that the majority may prescribe the terms and conditions of a lease

¹ *Town of Middletown v. Boston, etc. R. Co.*, 53 Conn. 358 (1885), (5 Atl. Rep. 706), where Judge Beardsley said: "But it is claimed that although there is no restriction in the language of the charter as to the term for which the company may lease its road, or as to the rent to be received, yet it is unreasonable so to construe it as to enable three-fourths of the stockholders to make a lease which deprives the other fourth of any chance for dividends for so long a period, and hence that the lease in question is not a rightful and lawful exercise of the power given by the charter. We see no ground for this claim, especially in view of the fact that leases of railroads are, and from the nature of the case must generally be, made for long terms. Railroads are leased, as they are built, with a view to the advantages to arise in the distant future from the development of population and business in the neighborhood

by the facilities for transportation which they afford. The complaint also charges that, by the provision of the lease, the entire resources of the defendant company from which income can be derived are fraudulently appropriated for the benefit of the holders of the preferred stock. This is not a charge of fraudulent conduct or intent in the making of the lease, but only that, by its operation, the income will be fraudulently appropriated for the benefit of the preferred stockholders. This is simply an allegation that this appropriation of the income will be disastrous to the common stockholders and wrongful; not that the preferred stockholders have acted fraudulently. If the company had the right, as it clearly had by its charter, to make the lease upon a three-fourths' vote, the Court cannot regard the effect of the lease as wrongful, or in any proper sense fraudulent."

is founded upon an elementary principle in corporation law, and, where there is only one class of stockholders, works fairly. But that preferred stockholders, interested in securing a certain payment of their limited dividends, may, with the aid of a minority of the holders of the common stock, obtain a perpetual guaranty of their dividends and deprive the common stockholders of any chance of return from the enhanced value of their property, is opposed to principles of natural justice. A rule producing such result, under forms of law, should be the subject of legislative enactment. Selfishness may work as grievous wrongs as fraud.

§ 191. *Remedies of Dissenting Stockholders.*—The protection of the interests of minority stockholders from the unauthorized acts of the majority, and of the interests of every stockholder from the unlawful acts of those intrusted with the management of the affairs of a corporation, is peculiarly within the province of equity.¹ Upon this principle, a court of equity, at the instance of a stockholder in a corporation which has, without authority, agreed to lease its property and franchises, or which has agreed to accept an unauthorized lease from another corporation, will grant an injunction against both corporations, parties to the agreement, restraining the execution of the lease.² Thus, where the directors of a railroad company, without the approval of its stockholders and without sanction of law, made a lease of its railroad for ninety-nine years, it was held that such lease

¹ In *Pond v. Vermont Valley R. Co.*, 12 Blatch. (U. S.) 287 (1874), upon a stockholder's bill to restrain an unauthorized lease of a railroad, about to be consummated by directors, Judge Woodruff said: "It is not insisted, and cannot be successfully claimed, that the matters complained of are not of equity cognizance; or that a court, having general jurisdiction in equity, has no jurisdiction, at the instance of stockholders, to restrain a corporation, or those engaged in the control and management of its affairs, from acts tending to the destruction of its franchises, or violations of the charter or from misuse or misap-

propriation of the corporate powers or property, or other acts prejudicial to the stockholders, amounting to a breach of trust on the part of the managers."

² *Winch v. Birkenhead, etc. R. Co.*, 5 De Gex & Sm. 562 (1852), (16 Jur. 1035, 13 Eng. L. & Eq. 506); *Commissioners of Tippecanoe County v. Lafayette, etc. R. Co.*, 50 Ind. 85 (1875); *Mills v. Central R. Co.*, 41 N. J. Eq. 1 (1886), (2 Atl. Rep. 453); *St. Louis, etc. R. Co. v. Terre Haute, etc. R. Co.*, 33 Fed. 447 (1888), s. c. on appeal, 145 U. S. 393 (1892), (12 Sup. Ct. Rep. 953).

was *ultra vires* and void, and that an action would lie in behalf of any stockholder against both corporations for an injunction and for the cancellation of the lease.¹

§ 192. **Acquiescence and Laches of Stockholders.** — Upon principles similar to those already considered in connection with the subjects of consolidation and sale, a stockholder by his acquiescence may waive irregularities in the execution of a lease of a railroad and may be estopped by his laches from taking steps to have it set aside.² Statutes providing that a prescribed majority of stockholders shall assent to a lease in a particular manner, and other provisions of a similar character, are enacted in the interests of the stockholders. The compliance with these regulations may be a condition precedent to the validity of the lease as against a stockholder, but he may be estopped by acquiescence and delay from setting up the invalidity.³ Thus an Illinois statute requir-

¹ Commissioners of Tippecanoe County v. Lafayette, etc. R. Co., 50 Ind. 85 (1875).

² See *ante*, § 49: "*Laches of Stockholders*;" *ante*, § 116: "*Defences to Stockholders' Actions. Estoppel*;" *ante*, § 150: "*Acquiescence of Stockholders*."

Although a stockholder in a railroad company, by voting for the lease of its road to another company, is estopped — as between himself and his corporation — from attacking its invalidity, the corporation is not estopped to proceed against the lessee for the avoidance of the lease; and the estoppel against the stockholder does not prevent him from instituting proceedings for such purpose in the name of the corporation when such procedure is otherwise permissible. Memphis, etc. R. Co. v. Grayson, 88 Ala. 572 (1889), (7 So. Rep. 122, 16 Am. St. Rep. 69).

³ St. Louis, etc. R. Co. v. Terre Haute, etc. R. Co., 145 U. S. 393 (1892), (12 Sup. Ct. Rep. 953), (s. c. 33 Fed. 447 (1888)). Citing Zabriskie v. Cleveland, etc. R. Co., 23 How. (U. S.) 381 (1859); Central Transportation Co. v. Pullman Car Co., 139 U. S. 60 (1891), (11 Sup. Ct. Rep. 478); Davis

v. Old Colony R. Co., 131 Mass. 258 (1881); Beecher v. Marquette, etc., R. Co., 45 Mich. 103 (1881), (7 N. W. Rep. 695); Thomas v. Citizens R. Co., 104 Ill. 462 (1882). See also Taylor v. Railroad Co., 4 Woods (U. S.), 575 (1882). In the *Terre Haute* case *supra* Mr. Justice Gray said (p. 403): "Although this statute, in terms, declares that any such lease, made without the written consent of the Illinois stockholders, 'shall be null and void,' it would seem to have been enacted for the protection of such stockholders alone, and intended to be availed of by them only. It did not limit the scope of the powers conferred upon the corporation by law, an excess of which could not be ratified or be made good by estoppel; but only prescribed regulations as to the manner of exercising corporate powers, compliance with which the stockholders might waive, or the corporation might be estopped, by lapse of time, or otherwise, to deny."

A delay of three months is not laches. Mills v. Central R. Co., 41 N. J. Eq. 1 (1886), (2 Atl. Rep. 453).

As to what constitutes acquiescence, see Kersey Oil Co. v. Oil Creek, etc. R.

ing the written consent of all the Illinois stockholders to a lease of a railroad in that State to a foreign corporation, was held to be for the personal benefit of the stockholders which they could waive by acquiescence. Judge Gresham said¹: "The silence of the stockholders for almost twenty years was equivalent to their written consent. Any resident stockholder might have enjoined the execution and performance of the contract by a suit brought in due time, but no such suits could be maintained after an acquiescence for the period stated, and no one but a stockholder could object to the contract on that ground."

II. *Method of approving and executing Railroad Leases.*

§ 193. **Statutory Requirements.** — The uniform policy indicated in statutes authorizing leases of railroads is to place restrictions upon the exercise of the power granted, to require the formal approval of a prescribed majority of the stockholders of the contracting corporations, and to prescribe the method to be followed in the adoption of the lease.² Thus it

Co., 12 Phila. 374 (1877), where the Court said (p. 376): "It is further contended that the contract and lease cannot be rescinded because the plaintiff company is estopped by its acquiescence and silence. What is acquiescence? It is something more than non-resistance. It is more than mere passiveness, unless the passiveness induces belief in error, and then it becomes an act."

See also *Boston, etc. R. Co. v. New York, etc. R. Co.*, 13 R. I. 260 (1881).

¹ *St. Louis, etc. R. Co. v. Terre Haute, etc. R. Co.*, 33 Fed. 447 (1888), affirmed 145 U. S. 393 (1892), (12 Sup. Ct. Rep. 953).

² *Alabama*. Code 1896, § 1170: Approval of proposed lease by holders of majority in value of stock of both corporations at meetings called for the purpose required.

Arizona. R. S. 1901, par. 864: As-

sent of holders of two-thirds of entire capital stock of each corporation — by vote or in writing — necessary to contract of lease.

Arkansas. San. & Hill's Dig. 1894, §§ 6321, 6328, 6332, 6338, 6343: Proposed lease must be assented to by holders of two-thirds of capital stock of each corporation after conditions and terms are agreed to by directors.

Colorado. Mills' Anno. Stat. 1891, § 612 (as amended by Sess. Laws 1899, p. 163): Assent of holders of two-thirds of capital stock of each company required to proposed lease.

Connecticut. G. S. 1888, § 3473: "No lease of any railroad is binding for more than twelve months unless approved by a vote of two-thirds of the stock represented at a meeting of the stockholders called for that purpose."

Georgia. Code 1895, § 2179, p. 128: Terms of lease are such as may be

is generally provided that the proposed lease shall not become effective until it shall have been approved by a vote of the holders of a designated majority of the capital stock of each corporation. In several States, however, formal action by the stockholders may be dispensed with if the specified number give their assent in writing and certificates showing the approval of the lease are filed in the office of the Secretary of State.

Some of these statutory requirements constitute conditions precedent to the validity of the lease. Others are directory only.

agreed upon. No particular method provided.

Kansas. G. S. 1897, § 95: Terms and conditions of lease must be agreed to by directors and must be ratified by vote of the holders of two-thirds of capital stock of each company or approved by such holders in writing. See also *ib.* ch. 70, § 94.

Massachusetts. Pub. Stat. 1882, ch. 112, § 220, p. 639: Directors agree upon the terms which must be "approved by a majority in interest of the stockholders of both corporations at meetings called for that purpose."

Michigan. P. A. 1901, Act No. 30, p. 50: "Stockholders owning a majority of stock of said companies shall consent thereto."

Minnesota. G. S. 1894, §§ 2721, 2736: Lease must be assented to by holders of two-thirds of capital stock of each company at meetings called for the purpose.

Missouri. R. S. 1899, § 1060: Holders of a majority of stock of each company must assent in writing to lease proposed by directors before it can be perfected.

Montana. Code 1895, § 912 requires approval of three-fifths of stockholders. *Ib.* § 923 requires approval by majority vote or by majority in writing. These provisions apply to leases authorized by different statutes.

Nebraska. Comp. Stat. 1901, § 1769: No lease shall be perfected until assented to by vote of holders of two-thirds of capital stock; (*ib.* § 4026), by vote or written approval of like number.

Ib. §§ 4018, 4019, authorize approval of certain leases by majority vote.

New Hampshire. See statute in note to § 180, *ante*: "*What Railroads may be leased. Statutory Provisions.*"

New Jersey. See statutes in note to § 180, *ante*: "*What Railroads may be leased. Statutory Provisions.*"

New Mexico. Comp. Laws 1897, § 3891: Holders of at least two-thirds of capital stock must assent to proposed lease.

New York. See statute in note to § 180, *ante*: "*What Railroads may be leased. Statutory Provisions.*"

North Dakota. Rev. Codes 1899, § 2954: Lease must be approved in same manner as consolidation. See *ante*, § 52: "*Formal Statutory Requisites*" (consolidation).

Ohio. Bates' Anno. Stat., 1787-1902, § 3301: Two-thirds of stockholders must approve proposed lease at meeting called by each corporation.

South Dakota. Anno. Stat. 1901, § 3906: Lease must be approved in same manner as consolidation. See *ante*, § 52: "*Formal Statutory Requisites*" (consolidation).

Tennessee. Code 1896, § 1540: Lease must be approved by votes of holders of three-fourths of capital stock.

West Virginia. Code 1899, ch. 54, § 82 a: Lease requires approval of holders of two-thirds of capital stock at meeting called for the purpose.

Wyoming. R. S. 1899, § 3206: Lease must be approved by vote of holders of a majority of stock, or their written approval may be given.

§ 194. **Construction of Statutes prescribing Mode of approving and executing Leases.**—Statutes prescribing the method of approving and executing leases of railroads are, in their essential elements, mandatory and must be strictly complied with.

A provision that no lease of a railroad shall be perfected until the stockholders of the contracting corporations shall have approved it by their votes at stockholders' meetings requires their approval in that form. Their consent obtained individually, outside of the meetings, is not sufficient. Deliberate action as stockholders is necessary.¹ Conversely, a provision that a proposed lease may be executed if a majority of the stockholders have assented in writing is not complied with by the casting of ballots in its favor by a majority of stockholders at a meeting where it has been the subject of consideration. Ballots do not contain the signatures of stockholders. They are cast to accomplish corporate, and not individual, action.²

¹ In *Peters v. Lincoln, etc. R. Co.*, 2 McCrary 275, (12 Fed. 514) (1881), Judge McCrary said: "The legislature has seen fit to provide that no lease of a railroad in this State, executed by one railroad company to another, shall be completed until a meeting of the stockholders of both companies shall have been called by the directors thereof or until such lease has been assented to by the votes of at least two-thirds of the stock represented. In our judgment the stockholders' meeting and the vote in such meeting upon the question of assenting to the proposed lease are matters of essence, of substance and not of mere form. . . . The action of stockholders outside of such meeting is individual action only. It is not such action as the law requires. It does not bind the corporation." See also same case upon amended bill, 14 Fed. 319 (1882).

In *Smith v. Hurd*, 12 Met. (Mass.) 385 (1847), Chief Justice Shaw thus stated the relation of a stockholder, in his individual capacity, to his corpora-

tion: "Should all the stockholders join in a power of attorney to any one, he could not take possession of any real or personal estate, any security or chose in action; could not collect a debt, or discharge a claim or release damage arising from any default; simply because they are not the legal owners of the property, and damage done to such property is not an injury to them. Their rights and their powers are limited and well defined."

See also *Humphreys v. McKissock*, 140 U. S. 304 (1891), (11 Sup. Ct. Rep. 779).

² *Humphreys v. St. Louis, etc. R. Co.*, 37 Fed. 313 (1889): "No vote at any meeting was required by the laws of Missouri, if the holders of a majority of the stock assented to the lease in writing, and the proper certificates were filed in the office of the Secretary of State. The propositions voted upon were in writing, and the voting was by written ballots. This is argued to have been an assent in writing to the lease; but the ballots were not signa-

Where an act of Parliament authorized one railroad company to grant, and another railroad company to accept, a lease of a railroad upon such terms as should be agreed upon, but provided that the power should not be exercised until the Board of Trade had certified that it had been proved to its satisfaction that half the capital of the leasing company had been raised and applied for the purposes of the act, it was held that no lease or binding agreement for a lease could be made before the certificate had been obtained.¹

Where power to make a lease is vested in the stockholders and they have agreed upon its terms and conditions, the directors have no power, without the consent of the stockholders, to make any material change in the terms agreed upon.²

§ 195. *Formalities attending Execution of Lease of Railroad.* — When the statutory requirements essential to the authorization of a railroad lease have been complied with, the matter of its formal execution is governed by principles applicable to corporations generally in the execution of conveyances.³

1. *Place of Execution.* The meeting of the stockholders for the authorization of a proposed lease must be held within the State where the corporation is chartered. When the lease is authorized, it may be executed by the proper officers within or without the State.⁴

tures, and were cast to accomplish corporate, and not individual, action. This does not seem to amount to the assent in writing contemplated by the statute."

Under a New York statute, however, requiring the written consent of two-thirds of the stockholders to a mortgage, it was held that a resolution passed at a stockholders' meeting by the vote of stockholders holding two-thirds of the stock amounted to the written assent required. *Beebe v. Richmond Light, etc. Co.*, 13 Misc. Rep. 737 (1895), (35 N. Y. Supp. 1). A statute authorized a railroad company to enter into an agreement for a lease with the assent of two-thirds of its shareholders. *Held*, that holders of registered bonds, having voting powers, might vote upon the question. *Hendrie v. Grand Trunk*

R. Co. (Ont.), 13 Am. & Eng. R. Cas. 62 (1883).

¹ *Kent Coast, etc. R. Co. v. London, etc. R. Co.*, L. R. 3 Ch. App. 656 (1868).

² *Met. El. R. Co. v. Man. El. R. Co.*, 11 Daly, 373 (1884), (14 Abb. N. Cas. 103, 15 Am. & Eng. R. Cas. 51). Compare, however, *People v. Met. El. R. Co.*, 26 Hun, 82 (1881).

³ That an agreement to give a lease does not require, in its execution, the formalities necessary in the execution of the lease itself, and that a decree of specific performance may be entered against a corporation, see *Conant v. Bellows Falls Canal Co.*, 29 Vt. 263 (1857).

⁴ *Pittsburgh, etc. R. Co. v. Columbus, etc. R. Co.*, 8 Biss. (U. S.) 456 (1879).

In *Wright v. Bundy*, 11 Ind. 404

2. *Authority of Officers or Agents.* While the authority of the officers or agents of a corporation to execute a lease must be shown, written evidence of a formal vote is not necessary, and it may be implied from facts and circumstances. In the absence of proof to the contrary, the law presumes that the acting officers of a corporation are rightfully in office, and it is not necessary to prove their election to establish the validity of their acts.¹

3. *Seals.* A seal is necessary upon a written lease made by a corporation only when it is required upon a similar lease made by a natural person.² When a seal is necessary, and a contract purporting to be sealed is shown to have been duly signed and executed by the proper officers, the law will presume that the seal was affixed by proper authority.³

(1858), the Court said: "The mere place where the active agents of a corporation enter into a contract must, in general, be immaterial. The important question arising must be one of power, not of place. The exercise of the power has relation to the place of their legal establishment, where the contract may be subsequently acted under. The meetings of the directors of a business corporation are not analogous to the sessions of a judicial tribunal. The corporation is organized by the election of directors; but the mere organization of the directors into a corporation for business afterwards, is quite a different thing."

Where the president of a railroad company operating a railroad in Kentucky acknowledged the execution of a mortgage thereof in Ohio it was held that the mortgage was properly executed. *Hodder v. Kentucky, etc. R. Co.*, 7 Fed. 793 (1881), affirmed *sub nom. Wright v. Kentucky, etc. R. Co.*, 117 U. S. 72 (1886), (6 Sup. Ct. Rep. 697).

For principle applicable to interstate consolidated corporation, see *Graham v. Boston, etc. R. Co.*, 14 Fed. 753 (1883), affirmed 118 U. S. 161 (1886), (6 Sup. Ct. Rep. 1009).

¹ In *Union Pacific R. Co. v. Chicago, etc. R. Co.*, 51 Fed. 327 (1892), affirmed 163 U. S. 564 (1896), (16 Sup.

Ct. Rep. 1173), Judge Sanborn said: "The Pacific Company delivered this contract, signed by its president and secretary, to the Rock Island Company. This was *prima facie* evidence that it was executed in behalf of the corporation by lawful authority." See also *Susquehanna Bridge, etc. Co. v. General Ins. Co.*, 3 Md. 305 (1852); *Jacksonville, etc. R. Co. v. Hooper*, 160 U. S. 519 (1895), (16 Sup. Ct. Rep. 379).

Where a committee of three directors were given discretionary power to execute a lease of corporate property, it was held that two of the members had power to affix the corporate seal, the third member being absent but having approved the execution of the lease. *Union Bridge Co. v. Troy, etc. R. Co.*, 7 Lans. (N. Y.) 240 (1872).

Where, however, a resolution provided "that the president and treasurer of this association be, and they are hereby authorized to execute and deliver . . . a lease," it was held that the authority of the two officers was joint, and that a lease executed by one of them alone was invalid. *Pond v. Vermont Valley R. Co.*, Fed. Cas. No. 11, 263 (1876).

² *United States Bank v. Dandridge*, 12 Wheat. (U. S.), 64 (1828).

³ *Fidelity Insurance, etc. Co. v.*

4. *Acknowledgment, Witnesses, etc.* Statutory provisions concerning the execution of a lease of real estate, adopted in the State where the railroad is situated, prescribing the number of witnesses, form of acknowledgment, etc., are, undoubtedly, applicable to railroad companies in the execution of leases of their roads. Failure to comply with such provisions, however, does not, as a general rule, affect the validity of the lease between the parties.

5. *Record.* A failure to record the lease of a railroad in the office of the Secretary of State or otherwise, as the statute may prescribe, will not, unless expressly so provided, affect its validity as between the parties.¹

§ 196. *Corporation may be estopped from alleging Irregular Execution of Lease.* — When a railroad company, acting within the scope of its corporate powers, executes a lease of its railroad to another corporation, and permits the lessee to take possession of the leased property and make improvements thereon, or when such a railroad company takes a lease and assumes control of the leasehold estate, it is estopped to allege irregularities in its own execution of the lease.² In

Shenandoah Valley R. Co., 32 W. Va. 224 (1889), (9 S. E. Rep. 180, 38 Am. & Eng. R. Cas. 577). Also *Jacksonville, etc. R. Co. v. Hooper*, 160 U. S. 519 (1895), (16 Sup. Ct. Rep. 379).

¹ The general principle that the recording of a deed or lease is only necessary for the purpose of giving notice, and that an unrecorded lease is as valid between the lessor and lessee as if recorded, is undoubtedly as applicable to leases of railroad and other corporations as to those of natural persons. The following cases illustrate this general principle: *Coleson v. Blunton*, 3 Haywood (Tenn.), 152 (1816); *Galpin v. Abbot*, 6 Mich. 17 (1858); *Lawry v. Williams*, 13 Me. 281 (1836); *Stearns v. Morse*, 47 N. H. 532 (1867); *Turner v. Strip*, 1 Wash. (Va.) 319 (1794); *Cooper v. Day*, 1 Rich. Eq. Rep. (S. C.) 26 (1844).

A State statute providing that every corporation operating a railroad within

the State under lease shall have the lease recorded is not invalid as an interference with interstate commerce. *Commonwealth v. Chesapeake, etc. R. Co.*, 101 Ky. 159 (1897), (40 S. W. Rep. 250).

As to *allegation and proof* of execution of lease see *George v. Central R., etc. Co.*, 101 Ala. 607 (1893), (14 So. Rep. 752). See also *Hawley v. Gray Bros., etc. Co.*, 106 Cal. 337 (1895), (39 Pac. Rep. 609).

² *Union Pacific R. Co. v. Chicago, etc. R. Co.*, 51 Fed. 309 (1892), *affirmed* 163 U. S. 564 (1896), (16 Sup. Ct. Rep. 1173); *Humphreys v. St. Louis, etc. R. Co.*, 37 Fed. 307 (1889).

In *Pittsburgh, etc. R. Co. v. Keokuk, etc. Bridge Co.*, 131 U. S. 381 (1889), (9 Sup. Ct. Rep. 770), the Supreme Court of the United States said: "When a contract is made by any agent of a corporation in its behalf, and for a purpose authorized by its charter,

Union Pacific R. Co. v. Chicago, etc. R. Co.,¹ Judge Sanborn said: "Under these circumstances, to permit this company now to repudiate this contract would violate every principle of equity and fair dealing. By its presentation to the Rock Island Company of this contract and this resolution, acts apparently official, by its acceptance of a part of the benefits of the contract, by its silence for seven months while this large expenditure of money was being made in reliance on this contract, it is estopped to declare it void, either because its board of directors failed to pass a formal resolution approving it, or because its secretary failed to state in its calls that this contract would be considered at the meetings that unanimously authorized and ratified it."

CHAPTER XVIII.

THE CONTRACT OF LEASE.

I. *Form and Construction of Railroad Leases.*

- § 197. Form of Lease.
- § 198. Consideration.
- § 199. Rule of Construction of Leases.
- § 200. Construction of Particular Leases.
- § 201. Lease for Longer Term than Existence of Corporations may be valid.
- § 202. Partial Invalidity of Leases. Void Restrictions.
- § 203. Dependent and Independent Contracts.

II. *Covenants in Railroad Leases.*

- § 204. Covenant to pay Rent. Assumption of Interest Payments.
- § 205. Covenant to pay Taxes.
- § 206. Covenant not to assign.
- § 207. Covenant to make Repairs.
- § 208. Covenant to pay Damages and defend Suits.
- § 209. Miscellaneous Covenants.

I. *Form and Construction of Railroad Leases.*

§ 197. **Form of Lease.**—The formal parts of a lease, executed by a railroad company of its road and franchises, gener-

and the corporation receives the benefit of the contract, without objection, it may be presumed to have authorized or ratified the contract of its agent."

¹ *Union Pacific R. Co. v. Chicago, etc. R. Co.*, 51 Fed. 328 (1892), *affirmed* 163 U. S. 564 (1896), (16 Sup. Ct. Rep. 1173).

ally and properly follow, so far as applicable, the form of a lease of real estate.

While any form expressing the intention of the parties may be adopted, there is an advantage in the use of the ordinary covenants and conditions in that they have acquired a recognized judicial construction.

A lease commences with the *premises*, the object of which is to state (1) the parties — the corporations, lessor and lessee — (2) the grant and (3) the description of the property leased — the railroad, franchises, appurtenances and personal property — which may be particularly set forth in the lease itself, or referred to in an attached schedule.

The *habendum* follows the premises, the object of which is to limit the grant.

After the habendum the *term* — the commencement and duration of the lease — is stated, and lastly the *reddendum*, which fixes the amount of rent to be paid, specifies the manner and form of payment, and the periods at which the payments are to be made.

Following these formal parts, the ordinary covenants, conditions and provisions of leases, so far as applicable to railroads, are inserted, together with any special provisions agreed upon in the particular case.¹

§ 198. *Consideration.* — The consideration of a lease is the rent. The rent is due primarily to the lessee, but, in the case of an individual, he may stipulate that it be paid to another person. The stipulation does not affect the validity of the lease.

The only reason why a similar contract might not be made by the officers — or by a majority of the stockholders of a corporation — is that they are trustees for the whole body of stockholders, and may not alienate corporate property unless the accruing benefit enures to their beneficiaries. But where one railroad company owns substantially all the stock and bonds of another company, a lease of the railroad of the latter for rent to be paid to the former company is not void for want

¹ As to form of railroad lease in *Clauses Act 1845* (8 Vict. ch. 20, England, when authorized, see *Railway* § 112).

of consideration. In such a case, the rent is paid directly to the corporation ultimately entitled to it — the real owner.¹

§ 199. **Rule of Construction of Leases.** — Leases of railroads being executed in pursuance of express legislative authority, receive a reasonably strict construction, but the object of the construction, as in the case of other leases and contracts, is to ascertain and effectuate the intention of the parties. In ascertaining the meaning to be given to any particular clause in a lease the court, as said by Mr. Justice Brown in *Chicago, etc. R. Co. v. Denver, etc. R. Co.*,² is “required to examine the entire contract, and may also consider the relations of the parties, their connection with the subject-matter of the contract, and the circumstances under which it was signed.”

When a lease consists of several distinct writings the different provisions of all the parts must be considered in order to ascertain the intention of the parties as evidenced by the instrument as a whole. Words and expressions must be given plain meanings which the context requires, in order to make, if possible, all the parts consistent.³

In case of ambiguity, the court may consider the practical construction given by the parties to the particular provisions in question.⁴

§ 200. **Construction of Particular Leases.** — Where a lease of a railroad provided that the lessee was “to have and to hold” the demised property during the term “paying the rents and keeping and performing the covenants” therein contained, it was held that any agreements and stipulations, the keeping of which was reasonably essential to the performance by the lessee of its part of the contract, should be treated as “covenants” whether so designated or not.⁵

¹ *Union Pacific R. Co. v. Chicago, etc. R. Co.*, 51 Fed. 309 (1892), *affirmed* 163 U. S. 564 (1896), (16 Sup. Ct. Rep. 1173). Same case in Circuit Court, 47 Fed. 15 (1891).

² *Chicago, etc. R. Co. v. Denver, etc. R. Co.*, 143 U. S. 609 (1892), (12 Sup. Ct. Rep. 479), *affirming* 45 Fed. 304 (1891).

³ *Cincinnati, etc. R. Co. v. Indiana,*

etc. R. Co., 44 Ohio St. 287 (1886), (7 N. E. Rep. 139, 26 Am. & Eng. R. Cas. 615).

⁴ *Chicago, etc. R. Co. v. Denver, etc. R. Co.*, 46 Fed. 145 (1890), s. c. 143 U. S. 596 (1892), (12 Sup. Ct. Rep. 479), 45 Fed. 304 (1891).

⁵ *South Carolina, etc. R. Co. v. Augusta, etc. R. Co.*, 111 Ga. 420 (1900).

A demise of a street railway not in

A provision in such a lease that in case the lessee corporation "shall at any time fail to pay to the lessor such sums of money as may be due under the contract, or shall fail to perform any other covenant herein, and such default or failure to perform shall continue for thirty days after written notice requiring such performance, then . . . it shall be lawful for the [lessor], at its option, to re-enter," gives the lessor, upon a breach by the lessee of any agreement or stipulation, the right to enforce the forfeiture of the lease.¹

Where a lease provided that, upon its expiration, the lessee should return the road in as good condition as when received, and where, under a statute, failure to operate the road would work a forfeiture of the lessor's charter, it was held that the lessee was bound to keep the road in operation.²

A railroad company demised its railroad and railroad property of every description "including" its railroad, rights and appurtenances; "and also" all buildings and equipment and all personal property belonging to it; "and also" all franchises, etc. It was held that the words "and also" related back to the words of demise and were not restrained by the word, "including," to distinctively railroad property.³

A provision in a lease that the lessee shall pay a definite sum for the expenses of keeping up the organization of the lessor imposes an obligation of a specific nature which the lessee is bound to perform, and against which it cannot set off the amount of a judgment which it holds against the lessor.⁴

The phrase "terminal facilities," as understood by persons operating railroads, includes only tracks used in making up

existence and the right to construct which depends upon the obtaining of consents from abutting proprietors is an executory contract. *Atlantic Ave. R. Co. v. Johnson*, 134 N. Y. 375 (1892), (31 N. E. Rep. 903).

¹ *South Carolina, etc. R. Co. v. Augusta, etc. R. Co.*, 111 Ga. 420 (1900).

² *Southern R. Co. v. Franklin, etc.*

R. Co. 96 Va. 693 (1899), (32 S. E. Rep. 485, 44 L. R. A. 297.)

³ *Gray v. Massachusetts Cent. R. Co.*, 171 Mass. 116 (1898), (50 N. E. Rep. 549).

⁴ *Louisville, etc. R. Co. v. Cumberland, etc. R. Co.*, 21 Ky. Law Rep. 1126 (1900), (54 S. W. Rep. 5); rehearing denied, 21 Ky. Law Rep. 140 (1900), (55 S. W. Rep. 884).

trains. A lease of such facilities does not include a track used only for the purpose of reaching car works.¹

§ 201. **Lease for Longer Term than Existence of Corporations may be valid.** — A lease for a time certain provided the lessee live so long is valid, and, extending this principle, it has been held that a lease to a railroad company for nine hundred and ninety-nine years is not invalid although the charter of the corporation will expire long before the termination of the lease, for the reason that the existence of the corporation *may* be prolonged by law for the entire term. *A fortiori* is this principle applicable in a case where the lease provides that it shall bind the successors and assigns of the parties thereto and the charter of the lessee corporation contains a provision for its continued renewal. As said by Judge Sanborn in *Union Pacific R. Co. v. Chicago, etc. R. Co.*²: “The contingency that this corporation will cease to exist, and leave neither assigns nor successors, is far too remote to have any influence upon the validity of this contract.”

Upon the same principle, a lease *by* a corporation for a longer period than its own existence is not void where the laws of the State creating the corporation permit an extension of its charter.³

§ 202. **Partial Invalidity of Leases. Void Restrictions.** — A conveyance of property which a corporation is authorized to make is not rendered wholly void by including therein property and franchises which the corporation is without authority to alienate. It is valid as to the former property and invalid as to the latter.⁴ This principle is applicable to leases.

¹ *Jacksonville, etc. R. Co. v. Louisville, etc. R. Co.*, 47 Ill. App. 414 (1893).

² *Union Pacific R. Co. v. Chicago, etc. R. Co.*, 51 Fed. 329 (1892). *Affirmed* 163 U. S. 592 (1895), (16 Sup. Ct. Rep. 1173), where the language of Judge Sanborn stated in the text is quoted with approval by Chief Justice Fuller. The contract denominated a “lease” in this case was really a trackage contract but the principles are equally applicable to a lease.

³ *Gere v. New York Central, etc. R. Co.*, 19 Abb. N. C. 193 (1885). A railroad company cannot prolong its existence, which depends upon the user of its franchises, by leasing them to another corporation which uses them for its own benefit. *Re Brooklyn, etc. R. Co.*, 81 N. Y. 69 (1881).

⁴ *Butler v. Rahen*, 46 Md. 541 (1877); *Hendee v. Pinkerton*, 14 Allen (Mass.) 381 (1867); *Gloninger v. Pittsburgh, etc. R. Co.*, 139 Pa. St. 13 (1891), (21 Atl. Rep. 211).

A lessor railroad corporation can impose upon the use of its railroad by the lessee only such restrictions as are consistent with the discharge by the lessee of those obligations, which, as common carrier and otherwise, it owes to the State and to the public. In *Metropolitan Trust Co. v. Columbus, etc. R. Co.*,¹ Judge Taft said: "Restrictions in the nature of conditions subsequent, which, in respect to the demised premises, forbid the lessee to do its public duties as a common carrier, would, if enforced, prevent the lessee from enjoying the demised premises at all in a lawful manner, and are, therefore, repugnant to the grant and void. When one takes an estate upon condition subsequent, which is void as against public policy, or for any other reason, the estate continues in the lessee or grantee, freed from the condition."²

§ 203. **Dependent and Independent Contracts.** — Where a contract of lease is invalid, the question whether other contracts, in a measure connected with and referring to it, are also void, depends upon whether such contracts are dependent upon the lease or independent of it.

While, sometimes, "by referring in a document signed by the party to another document, the person so signing in effect signs a document containing the terms of the one referred to"³ and a contract referring to an invalid lease may fall with it, such is not always the case. The effect of a reference depends upon the language of the instrument containing it. Thus, a lease of A.'s railroad to B. is not made dependent upon the validity and continuing existence of a lease of C.'s road to B. by a covenant that A. shall receive from B. a monthly statement of the gross receipts of C.'s road and shall have an opportunity to inspect its books and accounts, which are, however, important only in case B. seeks a reduction of the rental from the maximum amount stated in the lease.⁴ So, it was held that a bridge contract,

¹ *Metropolitan Trust Co. v. Columbus, etc. R. Co.*, 95 Fed. 22 (1899).

² *Railroad Co. v. Mathers*, 71 Ill. 592 (1874); 1 Story Eq. Jur. § 288; 2 Washb. Real Prop. (5th ed.), 8.

³ *Fitzmaurice v. Bayley*, 9 H. L. Cas. 99 (1860).

⁴ *Boston, etc. R. Co. v. Boston, etc. R. Co.*, 65 N. H. 393 (1888), (23 Atl. Rep. 529), where Doe, C. J., said

referring to certain articles in a lease for the purpose of defining the extent of liabilities and benefits assumed, did not make the bridge contract a part of the lease. The validity of the contract was entirely independent of the validity or invalidity of the lease.¹

II. *Covenants in Railroad Leases.*

§ 204. **Covenant to pay Rent. Assumption of Interest Payments.** — A lessee is liable for rent during his occupancy without an express covenant to pay it, and, therefore, the special covenant to pay rent may be termed a precautionary covenant, since its office is to prevent a lessee from assigning his lease, perhaps to an irresponsible person, and thereby releasing himself from further responsibility. When such special covenant appears in a lease a lessor has double security. There is privity of estate between him and the assignee; privity of contract between him and the lessee.

This covenant has a proper place in railroad leases and may contain provisions for the payment of rent in various ways and forms. It may stipulate that a fixed sum shall be paid at stated intervals; that prescribed dividends on the shares of the lessor corporation shall be provided for; or that a portion of the gross or net earnings arising from the opera-

(p. 402): "There has been no breach of the express covenant to pay rent, or the express agreement to render to the plaintiffs a statement of the gross receipts of the five roads, or the express covenant that books and accounts relating to the business of the five roads shall be open to the plaintiff's inspection. But the lease of the Northern and its branches to the defendants has been judicially annulled; and the plaintiffs contend that upon the validity and continuing existence of that lease the Montreal lease was made dependent. If the parties had intended this lease should terminate in case the Lowell voluntarily or involuntarily ceased to operate or control the Northern, their accidental failure to put that important part of their contract in the lease could

have been cured in a suit for the reformation of the defective instrument. In the lease there is no express stipulation of that kind, and no evidence on which it can be found that such a condition (which would naturally be expressed in direct and distinct terms) was intentionally left to be implied from the mode in which the lessees are to ascertain and show the amount of rent to be paid if they seek to avoid the payment of the largest sum named in the contract. . . . The lease of the Montreal was not made dependent upon the validity and continuing existence of the lease of the Northern."

¹ *Railway Co. v. Keokuk Bridge Co.*, 131 U. S. 371 (1889), (9 Sup. Ct. Rep. 770, 39 Am. & Eng. R. Cas. 213).

tion of the leased railroad shall be turned over to the lessee or expended in its behalf. Thus, under a statute authorizing railroad companies, to lease and operate the roads of other companies, a covenant in a lease by which the lessee, in lieu of directly paying rent, guarantees the payment of interest accruing upon bonds of the lessor was held valid.¹ Where such a covenant takes the form of an agreement to pay to the trustees of the lessor's mortgage interest thereon as it accrues, the lessee corporation is directly liable to the mortgagees therefor although they are not parties to the lease, since the agreement shows that it was intended for their benefit.²

¹ *Eastern Townships Bank v. St. Johnsbury, etc. R. Co.*, 40 Fed. 424 (1889). Judge Wheeler said: "The laws of Vermont, under which the defendant has and exercises its corporate powers, provide that 'railroad companies in this State may make contracts and arrangements with each other, and with railroad corporations incorporated under the laws of other of the United States, or under the authority of the government of Canada, for leasing and running the roads of the respective corporations, or parts thereof, by either of their respective companies.' R. L. Vt. § 3303. This statute conferred ample power upon the defendant corporation to take the lease, and to agree to pay the rent as it should fall due, and doubtless to arrange for paying the rent, by paying coupons of the same amount or guarantying their payment."

² *Welden Nat. Bank v. Smith*, 86 Fed. 398 (1898), s. c. *sub nom.* *Grand Trunk R. Co. v. Central Vermont R. Co.*, 78 Fed. 690 (1897). In this case where a lessee under a railroad lease covenanted to pay all obligations of the lessor incurred "as common carriers, warehousemen, or otherwise," and thereafter to pay the interest on certain mortgage bonds of the lessor, it was held, that "or otherwise" referred only to obligations of the same class as those enumerated, and that earnings accru-

ing in the hands of receivers of the lessee were applicable to interest on the bonds, rather than to judgments on claims not falling within that class.

In *Day v. Ogdensburgh, etc. R. Co.*, 107 N. Y. 129 (1887), (13 N. E. Rep. 765), an agreement between two railroad companies and others provided that one company should issue so many of its first mortgage bonds, not exceeding a sum specified, as should be sufficient to construct its road; that these should be purchased by the parties to the agreement, other than the two corporations. Defendant corporation agreed when the road was completed to take a lease of it on terms and conditions specified. After the completion of the road a lease was executed as agreed upon. By the terms of the lease defendant agreed to maintain and operate the demised road as a part of its line, to pay taxes and certain other expenses, and to pay at maturity the principal and interest of the bonds; also, that the gross earnings of the road should be applied, first, to pay the interest accruing, and second, for the creation of a sinking fund for the payment of the principal of the bonds. It was held that the agreement and lease were within the power of the two corporations to make and were valid. See *post*, § 212: "*Rights of Stockholders when Rent is payable in Form of Dividends.*"

§ 205. **Covenant to pay Taxes.** — In this country, as distinguished from England, lands and property are generally assessed in the name of the owner, so that the lessee is under no obligation to pay taxes unless he assume them as a part of the rent. Covenants wherein the lessee assumes the taxes are not uncommon in leases of real estate and are general in leases of railroads, although the systems of taxing that class of property vary widely in the different States.

Upon the principle that a tax, in the sense in which the word is ordinarily used, is "something exacted for public service and not by way of compensation for benefits conferred," it is held that a covenant to pay "all taxes" does not include an assessment for benefits, or other special rates of a similar nature.¹ The application of this principle is, however, readily and commonly avoided by the use of the phrase, "all taxes and assessments."

Where a railroad lease provided that the lessee should pay all taxes and assessments imposed during the term by any governmental or lawful authority on the railroad and leased property, or on any business, earnings or income of the same or, "by reason of the ownership thereof," it was held that the lessee was bound to pay a tax imposed upon the franchise of the lessor, it being a tax imposed "by reason of the ownership" of the road.²

A general covenant to pay all taxes relates only to future taxes imposed during the term of the lease and involves no assumption of past due taxes. Thus, a covenant by the lessee in a railroad lease that it "will pay, as operating expenses, all taxes and assessments . . . which may be lawfully levied or assessed" upon the demised property, is not an assumption of liability for taxes already assessed and levied.³

¹ Wood's *Landlord and Tenant*, p. 685, and cases there cited.

² *Thomas v. Cincinnati, etc. R. Co.*, 93 Fed. 587 (1899).

A lessee corporation which covenants to pay all taxes assessed upon "the real and personal property, franchises, capital stock or gross receipts" of the

lessor during the term is not bound to pay a tax levied on "dividends." *Jersey City Gas Light Co. v. United Gas Imp. Co.*, 58 Fed. 323 (1893), s. c. 46 Fed. 264 (1891).

³ If there is any contract implied by law whereby one railroad company, acquiring the control of the property,

The covenant to pay taxes and assessments is for the sole benefit of the lessor corporation. It confers no right of action against the lessee in favor of the municipality levying the assessment, because there is no privity between them.¹

§ 206. **Covenant not to assign.** — The covenant not to assign or sublet the demised premises without the written consent of the lessor, used in ordinary leases of real estate, is generally inserted in railroad leases, and is of the utmost importance when so employed, in safe-guarding the interests of the lessor corporation. As observed by Judge Clark in *Boston, etc. R. Co. v. Boston, etc. R. Co.*:² "The lessor had the right to choose its tenant, and, whatever may have been its purpose in doing it, the conclusion is irresistible that the stipulation against assigning, underletting or parting with the possession of the demised premises, was inserted in the lease to secure the exercise of the personal integrity, discretion, and judgment of the lessee, in shaping the policy and controlling the management and operation of the road."

Therefore, when a lessee corporation voluntarily parts with its power to control the operation of the railroad leased, and becomes the mere agent of a third corporation in the operation of the road, the covenant not to assign is broken in substance and the estate granted by the lease is forfeited.³

income, etc., of another, becomes directly liable for taxes already due, and constituting a lien thereon, for the fiscal year then current, such liability is only in proportion to the part of the fiscal year remaining after the assumption of such control. *Cleveland v. Spencer*, 73 Fed. 559 (1896).

A railroad company leased part of its road to another company, which agreed to pay all taxes assessed against the leased property. Under the statute, taxes on the leased line were assessed against the lessor, as owner, in the same manner as the taxes upon the part of its road not leased, and were paid, reimbursement being made by the lessee. The assessment upon the property of the lessor, including the leased line, having been raised, it was contested, but, after

extended litigation, was sustained. In the meantime, receivers had been appointed for the lessee, and they took possession of the leased line and paid other taxes through the issue of receiver's certificates. It was held that they were bound to repay to the lessor the proper proportion of the judgment for the contested taxes. *United States Trust Co. v. Mercantile Co.*, 88 Fed. 140 (1898).

¹ *Chicago, etc. R. Co. v. City of Ottumwa*, 112 Iowa, 300 (1900), (83 N. W. Rep. 1074, 51 L. R. A. 763).

² *Boston, etc. R. Co. v. Boston, etc. R. Co.*, 65 N. H. 448 (1888), (23 Atl. Rep. 529).

³ A covenant by the lessee of a railroad not to assign the lease is broken by its assignment of the future gross

The covenant not to assign as usually drawn, however, is, under certain conditions, of no benefit to the lessor corporation and may be broken by indirection without incurring a forfeiture. Thus, upon the principle that a mortgage, outside of the New England States, is not a transfer of the legal title or possession, it is held that the giving of a mortgage of a leasehold interest, without the consent of the lessor, is not a violation of the covenant not to assign; and, upon the further principle that an assignment or transfer, *by operation of law*, does not constitute a breach of the covenant, it is held that a sale of the leasehold interest in foreclosure proceedings is not a breach, because it is *in invitum*.¹ A lessee railroad company may, therefore, mortgage its lease and the leasehold interest may be sold to a corporation objectionable to the lessor, without a breach of the covenant not to assign. The position of the lessor may be protected, however, by providing in the covenant that the leasehold interest shall not be mortgaged without the lessor's consent, or by adding a provision that the lessor may terminate the lease if transferred by operation of law.

The general rules of law relating to this covenant, as, for example, that where consent has once been given to an assignment the restriction is gone forever, and that the lessor may waive the forfeiture occasioned by a breach of the covenant by

earnings of the road to a third person and contracting to use and operate it under the direction of the assignee. *Boston, etc. R. Co. v. Boston, etc. R. Co.*, 65 N. H. 393 (1888), (23 Atl. Rep. 529).

A contract whereby a railroad company — lessee of a railroad — agrees with another company for the operation of the leased road, the latter company receiving the income, paying the expenses and fixed charges, and turning over the surplus to the former company, is an operating contract and not an assignment. *St. Joseph, etc. R. Co. v. St. Louis, etc. R. Co.*, 135 Mo. 173 (1896), (36 S. W. Rep. 602).

The assignee of the lease of a railroad cannot take advantage of the fact that the lease was not consented to by

the lessor corporation as required by its terms. *Schmidt v. Louisville, etc. R. Co.*, 101 Ky. 441 (1897), (41 S. W. Rep. 1015, 38 L. R. A. 809).

¹ *Riggs v. Pursell*, 66 N. Y. 193 (1876). This decision is expressly put upon the ground (p. 200) that "a mortgage in this State of land is not a transfer of the legal title, or the possession, but a mere security," citing *Trimm v. Marsh*, 54 N. Y. 599 (1874), where the New York rule, as distinguished from the rule in England and the New England States, is discussed at length. It may, therefore, be doubtful whether a mortgage in those States where it is regarded, between the parties, as a conveyance of the fee, would not constitute a breach of the covenant not to assign.

accepting rent,¹ are applicable to leases of railroads only as they apply to leases in general, and are fully considered in treatises upon the general subject of the relation of landlord and tenant.

§ 207. **Covenant to make Repairs.** — The covenant upon the part of the lessee corporation to make repairs is usually inserted in railroad leases. It often appears in conjunction with the covenant — of an analogous nature — to preserve the leased personal property and to substitute new for old.

A covenant in a railroad lease that the lessee corporation shall “return said road and property, both real and personal, at the termination of this lease, in as good condition and repair in all respects as it is now in, natural wear only excepted,” binds the lessee to keep the road in good running condition, and to renew all structures which, by decay or accident, become unsafe.²

Under a covenant in a lease to make “necessary repairs,” it has been held that a lessee is obliged only to make such repairs as its own use of the premises requires. In so holding the Court said: “The word ‘necessary’ applied to repairs, may well be understood to denote such repairs as were necessary to the defendants, and not such as might be necessary for some future or different use of the property, after their lease had expired.”³

§ 208. **Covenant to pay Damages and defend Suits.** — While, upon considerations of public policy, the courts of several States hold that a lessor railroad company cannot, by leasing its railroad, even with legislative sanction, absolve itself from liability to third persons for the negligence of the lessee in the operation of the road, and while it is unquestioned that the liability of the lessor for the proper discharge of its primary obligations continues after a lease as before, yet, as between

¹ A lessor corporation may waive a breach of a covenant not to assign or sublet, by acquiescing and by failing to object within a reasonable time when the leased property is turned over to another without its consent. “The Elevator Case,” 17 Fed. 200 (1881).

² *Sturges v. Knapp*, 31 Vt. 1 (1858). See also *Southern R. Co. v. Franklin, etc. R. Co.*, 96 Va. 693 (1899), (32 S. E. Rep. 485, 44 L. R. A. 297).

³ *White v. Albany R. Co.*, 17 Hun (N. Y.), 98 (1879).

themselves, the liability to pay damages and the obligation to defend suits, may be the subject of agreement between the lessor and lessee, and covenants relating thereto are usual in railroad leases. "Similar provisions," said Judge Brawley in a recent case,¹ "will doubtless be found in every contract whereby one railroad company undertakes to lease or operate another. Suits, actions, or damages are incidental to the operation of every railroad, and provision must always be made whereby one or the other of the contracting corporations assumes such burdens."

As the corporations — lessor and lessee — stand upon the same plane, such covenants as they may agree upon regarding the assumption of liabilities are not opposed to public policy, and are valid and enforceable.

§ 209. **Miscellaneous Covenants.** — In addition to the covenants already considered, the contracting parties to a railroad lease, authorized by legislative authority, have, as incident to the power conferred, the right to include in the lease such other covenants, usual in leases, as may be agreed upon in the particular case.² Thus, a corporation authorized to lease a building may covenant to keep it insured;³ and a railroad company, as lessee, may properly covenant "to use all proper and reasonable means to maintain and increase the business" of the leased railroad.⁴

¹ *South Carolina, etc. R. Co. v. Carolina, etc. R. Co.*, 93 Fed. 557 (1899). See also *Stephens v. Southern Pacific Co.*, 109 Cal. 86 (1895), (41 Pac. Rep. 783).

A lease by a railroad company of a portion of its right of way, upon condition that the company shall not be liable for any damage to buildings or personal property situated thereon, by reason of fire originating from its locomotives, or for damages resulting from the negligence of its employees or agents, is not void, as against public policy, either under the Iowa decisions or upon general principles. *Hartford Fire Ins. Co. v. Chicago, etc. R. Co.*, 70 Fed. 201 (1895).

² *Abby v. Billups*, 35 Miss. 618 (1858), (72 Am. Dec. 143).

³ A corporation with power to lease a building may, in consideration of the lessor's obligation to rebuild in case the building should be burned down, covenant to keep the same insured. *Jacksonville, etc. R. Co. v. Hooper*, 160 U. S. 514 (1896), (16 Sup. Ct. Rep. 379).

⁴ Such a covenant is not necessarily broken by the building of a parallel line by the lessee; the determination of the question depends upon all the facts and circumstances of the case, including the use to be made of the line so built, and the nature and amount of its traffic. *Catawissa R. Co. v. Phila-*

CHAPTER XIX.

RIGHTS AND LIABILITIES OF LESSOR CORPORATION.

I. Rights and Remedies of Lessor Corporation.

- § 210. Lessor Corporation retains Prerogative Powers — Right of Eminent Domain.
- § 211. Rights of Lessor when entitled to Share of Earnings — Equitable Lien.
- § 212. Rights of Stockholders when Rent is payable in Form of Dividends.
- § 213. Mortgage of Rent Charge.
- § 214. Remedies of Lessor Corporation.

II. Liabilities of Lessor Corporation.

- § 215. Obligations of Lessor Corporation to State.
- § 216. Lessor Corporation cannot avoid Statutory Obligations unless exempted.
- § 217. Lessor cannot avoid Primary Obligations unless exempted.
- § 218. Liability of Lessor for Negligent Operation of Railroad — (A) Under Unauthorized Lease.
- § 219. Liability of Lessor for Negligent Operation of Railroad — (B) Under Authorized Lease.
- § 220. Liability of Lessor for Negligent Operation of Railroad — (C) To Employees of Lessee.
- § 221. Liability of Lessor for Negligent Operation of Railroad — (D) When it shares in Control.
- § 222. Liability of Lessor upon Contracts of Lessee.
- § 223. Liability of Lessor for Reconstruction and Repairs.
- § 224. Taxation of Leased Railroads.

I. Rights and Remedies of Lessor Corporation.

§ 210. Lessor Corporation retains Prerogative Powers — Right of Eminent Domain. — A lease of a railroad, executed with legislative sanction, carries with it the right to exercise the

delphia, etc. R. Co., 14 Pa. Co. Ct. Rep. 280 (1894).

A railroad company leased to another company the right to use a portion of its road for ninety-nine years, renewable forever. The lease provided that the lessee should not extend its road into certain coal territory, or receive coal for transportation from any connecting lines, and that, in case of violation of such conditions, the right of the lessee to use the demised road should be suspended during its continuance. The successor of the lessee acquired, by pur-

chase, certain connecting lines extending into the prohibited territory, which it operated in connection with its original road for nine years, without objection from the lessor. *Held*, that conceding the provision against extension to have been valid, it was waived by the lessor by acquiescence, and with it the right to object to the transportation by the lessee of coal received for shipment on its purchased lines. *Metropolitan Trust Co. v. Columbus, etc. R. Co*, 95 Fed. 18 (1899).

franchises necessary for its maintenance and operation.¹ Extraordinary powers and privileges are, however, not included unless the State expressly approve their transfer and the lease clearly embrace them.

As a general rule, a lessor corporation retains its prerogative powers. Thus, the lease of a railroad does not divest a lessor corporation of the right of eminent domain. The same necessity for taking lands may exist when a railroad is in the hands of a lessee as when in the hands of its owner, and pending condemnation proceedings are not abrogated by a lease but may be continued in the name of the lessor.²

As the right of eminent domain remains in the lessor, it cannot, manifestly, be exercised by the lessee in its own name;³ but the lessee, when duly authorized, may institute and prosecute condemnation proceedings in the name of the lessor, but for its own benefit.⁴ These principles do not prevent a

¹ See *ante*, § 157: "*Essential Franchises pass upon Sale of Railroad.*"

² *Kip v. New York, etc. R. Co.*, 67 N. Y. 229 (1876), *per* Church, J.: "In the supplemental complaint the plaintiffs allege the leasing of the defendant's road and property to the New York Central and Hudson River Railroad Company for 401 years, and claim that such lease operated to abrogate the pending proceedings to condemn the land in question, and terminated and removed all necessity for the acquisition thereof for the corporate use of the defendant. In this I think the learned counsel for the defendant is mistaken. The lease did not affect the defendant corporation in its relation to the State. The same necessity existed for the land proposed to be condemned after as before the lease for the purpose of the defendant as a corporation."

See also *Matter of Petition of New York, etc. R. Co.*, 99 N. Y. 21 (1885) (1 N. E. Rep. 27).

In *Chicago, etc. R. Co. v. Illinois Central R. Co.*, 113 Ill. 156 (1885), it was held that it was immaterial that the increase of the right of way for which property was sought to be con-

demned, was occasioned by the use of the road by a lessee; that the use was a public use, and that the need of the lessee was that of the lessor.

³ *Mayor, etc. of Worcester v. Norwich, etc. R. Co.*, 109 Mass. 113 (1871): "None of these leases or assignments can be construed to extend to the lessees or assignees the power to exercise the right of eminent domain, or to restrict the right of the legislature to alter or repeal the charters. Their rights are subordinate to that right; and if the legislature shall see fit to exercise it, they are not bound to give notice to any of these parties. . . . The lease by the Norwich and Worcester Railroad Company did not make the lessees, or their representatives, parties to the grant of power to exercise the right of eminent domain. That right remained in the original corporation, and the legislature might properly deal with it exclusively in amending their charter."

⁴ *Chicago, etc. R. Co. v. Illinois Central R. Co.*, 113 Ill. 156 (1885).

See also *Kip v. New York, etc. R. Co.*, 67 N. Y. 227 (1876); *Dietrichs v. Lincoln, etc. R. Co.*, 13 Neb. 361 (1882),

lessee corporation from exercising in its own name, for proper purposes, the power of eminent domain conferred upon it by statute. In such a case, it exercises an original and not a derivative power which *might* be broad enough to authorize the condemnation of lands connected with the lessor's road.¹

§ 211. **Rights of Lessor when entitled to Share of Earnings — Equitable Lien.** — It is competent for two railroad corporations, parties to a lease of a railroad, to agree that the lessee company shall pay a fixed rental to the lessor or that the earnings of the leased road, gross or net, shall be divided in prescribed proportions between the parties.

Where the lease expressly provides that the share of the earnings payable to the lessor is in lieu of rent — a measure of the rental — or where it may be plainly inferred that such is the case, the remedies of the lessor are confined to the enforcement of the covenants of the lease. Thus, in a case where a lease provided that "as rental for the said demised premises" the lessee company should pay a percentage of its gross earnings, in excess of a fixed sum, to the lessor, Judge Lurton said:² "The rental is determined by the amount of gross earnings. These earnings belong to the lessee company. The complainant has no right to any specific dollar or part of a dollar."

Where, however, it is clear from the language of the lease that a division of earnings, *as earnings*, is contemplated, the duty of the lessee does not arise from its mere covenant, but the share of the lessor becomes, in equity, its property immediately upon its receipt by the lessee. The lessor has an equitable lien upon such share and it is held in trust by the

(13 N. W. Rep. 624); *Gottschalk v. Lincoln, etc. R. Co.*, 14 Neb. 389 (1883), (15 N. W. Rep. 695).

A *Michigan* statute (P. A. 1901, p. 117, § 19 of Act. No. 80) authorizes a lessee of a railroad to institute condemnation proceedings with the consent, and in the name of, the lessor.

¹ Whether the lessee of a railroad can exercise the right of eminent domain to build switches and spur tracks to the leased line, which do not connect

with its own line, or whether such right must be exercised by the lessor company, — *quære*. *Chattanooga Terminal R. Co. v. Felton*, 69 Fed. 273 (1895).

It is provided by statute in *Arkansas* (S. & H. Dig. 1894, § 6342), *Ohio* (Bates' Anno. Stat. (1787-1902), § 3300), *Wyoming* (R. S. 1899, § 3206), that a lessee of a railroad may exercise the right of eminent domain.

² *New York, etc. R. Co. v. New York, etc. R. Co.*, 58 Fed. 282 (1893).

lessee for the benefit of the lessor and may be followed in equity.¹

In case of the appointment of a receiver for the lessee, he may be compelled to restore any portion of the earnings due the lessor and misapplied by the lessee, even if it be necessary to appropriate the earnings of the road during the receivership for that purpose.² Thus, a provision in a railroad lease that the "lessee shall, in each and every year of the term demised, pay or cause to be paid to said [lessor] in the manner and at the times hereinafter specified, thirty per centum of the gross earnings, of the demised property," provides for a division of the earnings, as such, and vests in the lessor the equitable title to its share of such earnings upon their receipt by the lessee. Where the lessee, under such a lease, has failed to pay over the lessor's share of the earnings and has mingled the same with its own funds, bondholders of the lessor, the interest on whose bonds is required by the terms of the lease to be paid from such share, are entitled to have the amount, so misapplied by the lessee, restored by its receiver.³

¹ *Terre Haute, etc. R. Co. v. Cox*, 102 Fed. 825 (1900).

In *Bank v. Smith*, 86 Fed. 398 (1898), where the lease provided that "all gross earnings, income and receipts," should, in each year, after payment of expenses of operation be expended, among other things, for payment of interest on bonds of the lessor company, Judge Wallace said, with reference to the covenant to pay the interest upon the bonds (p. 401): It "gave to the bond holders an equitable lien upon the earnings, because the trustee could have compelled the lessee to apply the earnings to the payment of the interest."

The general principle upon which the rule stated is based is thus stated in *Pomeroy's Equity Jurisprudence* (vol. 3 (2d ed.), § 1236): "The doctrine is carried still further and applied to property not yet in being at the time when the contract is made. It is well settled that an agreement to charge, or to assign, or to give security upon, or to

effect property not yet in existence, or in the ownership of the party making the contract, or property to be acquired by him in the future, although, with the exception of one particular species of things, it creates no legal estate or interest in the things when they afterwards come into existence or are acquired by the promisor, does constitute an equitable lien upon the property so existing or acquired at a subsequent time, which is enforced in the same manner and against the same parties as a lien upon specific things existing and owned by the contracting party at the date of the contract."

² *Terre Haute, etc. R. Co. v. Cox*, 102 Fed. 825 (1900).

³ In *Terre Haute, etc. R. Co. v. Cox*, 102 Fed. 833 (1900), Judge Groscup said: "There is no word respecting rentals; there is no plain inference that the thirty per centum thus agreed upon shall be a mere measure of rentals. It is, as indisputably as language can make

§ 212. **Rights of Stockholders when Rent is payable in Form of Dividends.** — A distinct provision in a lease that the lessee shall pay, directly, to the stockholders of the lessor corporation, as rental, specified dividends upon their shares, enures to their benefit and gives them individual rights of action against the lessee.¹ This is upon the principle that “when one person makes a promise to another for the benefit of a third person, that person may maintain an action based on such promise.”²

It is essential, however, in actions depending upon this principle, that a distinct provision for the direct benefit of the third person be shown. An agreement wherein a lessee corporation guarantees the lessor a specified annual dividend upon its capital stock, free from taxes, payable to the lessor, is not a guarantee to the stockholders individually, although evidently intended to enable the lessor corporation to make that dividend to its stockholders.³ Similarly, a provision in a

it, a plain division of the earnings between the parties whose properties, taken together, produce the earnings. Unless an arrangement for division of earnings, as earnings, is in law an impossibility, the language employed can bear no interpretation, other than a contemplated division of earnings, as earnings. . . . It is clear to us, then, that, in the case under consideration, the duty of the Indianapolis Company, in respect to the thirty per centum of gross earnings, does not arise out of its mere promise; it is an equity growing out of the conditions from which the unified railway lines arose. The division of the earnings does not rest in an intention merely to be executed in the future; it is to be regarded, in equity, as a present fact, made so by the circumstances, together with the agreement that brought about the means creating such earnings.”

¹ It does not follow from the fact that the stockholders as the parties beneficially interested *may* maintain an action for the recovery of dividends that the lessor corporation — the party to the contract — may not likewise bring

suit to enforce it. In fact Judge Nelson, in *Pacific R. Co. v. Atlantic, etc. R. Co.*, 20 Fed. 280 (1884), said that the lessor corporation was *the* proper party to enforce a claim for unpaid dividends payable under a lease directly to the stockholders. This decision, however, in so far as it seems to deny any right in the stockholders to sue in such a case, cannot be justified upon principle. See cases cited in note 2.

² *Schemerhorn v. Vanderheyden*, 1 Johns. (N. Y.) 139 (1806). See also *Welden National Bank v. Smith*, 86 Fed. 402 (1898). In *Austin v. Seligman*, 18 Fed. 522 (1883), Judge Wallace said: “The result of the better-considered decisions is that a third person may enforce a contract made by others for his benefit, whenever it is manifest from the nature or terms of the agreement that the parties intended to treat him as the person primarily interested.” See also Mr. Wharton’s elaborate note to this case for full consideration of the general subject and citation of many authorities.

³ In *Flagg v. Manhattan R. Co.*, 10

lease that the lessee corporation shall pay to the lessor a sum equal to a fixed percentage upon its capital stock is an agreement for the direct benefit of the corporation and gives a stockholder no right of action. The rental is due and payable to the corporation. It may or may not be appropriated for the payment of dividends to stockholders.¹

§ 213. **Mortgage of Rent Charge.** — The execution of a lease of a railroad for a limited term does not affect the right of the lessor to mortgage the remainder estate. But a perpetual lease, without a clause of re-entry for non-fulfilment of its conditions, leaves nothing in the lessor corporation but a claim against the lessee for rent.² This rent may be a charge upon the income of the leased property. In such a case, the lessor may mortgage the rent charge.³

§ 214. **Remedies of Lessor Corporation.** — The remedies of a railroad company to enforce its demands against third per-

Fed. 430 (1881), Judge Blatchford said: "The language of article 2 of the lease is that the Manhattan guarantees to the Metropolitan an annual dividend of ten per cent on the capital stock of the Metropolitan . . . There is no agreement either by the Manhattan or the Metropolitan that these sums shall be paid to the stockholders of the Metropolitan. . . . The case, therefore, is not one of any vested right in the stockholders of the Metropolitan to the ten per cent payments."

¹ In *Beveridge v. New York Elevated R. Co.*, 112 N. Y. 24 (1889), (19 N. E. Rep. 489), the New York Court of Appeals said (*per* Gray, J.): "Regarding then, the lease itself and the so-called guaranty which is contained among its provisions. I find therein no contract made with individual stockholders, but only one made with the New York Company which stipulates for the payment of a sum of money equal to ten per cent upon the capital stock of that company. There is no contract to pay ten per cent dividends to individual stockholders upon their holdings; nor any contract that the New York company will pay it out in the shape of ten per cent divi-

dends to its stockholders. Payments under that contract are to and for the lessor corporation and go into its treasury, as would any other moneys or revenues derived from, or produced by, corporate property." See also *Harkness v. Manhattan El. R. Co.*, 54 N. Y. Super. Ct. 174 (1885).

² *Hazard v. Vermont, etc. R. Co.*, 17 Fed. 753 (1883); *Vermont, etc. R. Co. v. Vermont Cent. R. Co.*, 34 Vt. 1 (1861). See also *Langdon v. Vermont, etc. R. Co.*, 54 Vt. 593 (1882).

³ In *Hazard v. Vermont, etc. R. Co.*, 17 Fed. 756 (1883), Judge Wheeler said: "The disposition of the rent and the claim for it in future is the principal thing, for that represents substantially the corporate assets of the Canada company, and when that is gone the transfer or surrender of the stock would be a mere nominal formality. Power to deal with the rent is implied in the power to make the lease and reserve the rent, which it was held the corporation had. (*Vermont, etc. R. Co. v. Vermont Cent. R. Co.*, 34 Vt. 1 (1861)). And powers necessarily implied from those expressly granted are as well granted as the express powers."

sons are in no way affected by the fact that it has leased its railroad.

The remedies of a railroad company, as lessor, against its lessee, to recover damages for breach of covenant or to enforce a forfeiture are, in general, those which are available to a lessor under an ordinary lease of real estate.

Where an action at law will furnish a lessor corporation adequate relief, resort cannot be had to equity.¹ Thus, where a legal action against a responsible corporation is an adequate remedy for neglect to keep a railroad in repair, in violation of a covenant, the remedy of a receivership will be denied.²

The circumstances may be such, however, that a remedy at law will be inadequate. In such a case equity will afford relief. Thus, where a lessee railroad company covenanted to keep the line in as good repair as when received, and where its abandonment of the road before the expiration of the lease would result in loss of traffic, deterioration of the road and, possibly, forfeiture of the lessor's charter for non-user, it was held that the lessor was entitled to an injunction preventing a threatened abandonment.³

A lessor corporation has a right to re-enter for condition broken, according to the terms of the lease. It may also, under such conditions, maintain ejectment and similar actions for the recovery of the possession of the leased property.

There is a *dictum* to the effect that "when either party, lessor or lessee, claims that acts have been done which render the continuing of the relation no longer proper, such party can go into a court of equity, on general principles, and ask

¹ In *Boston, etc. R. Co. v. Boston, etc. R. Co.*, 65 N. H. 393 (1888), (23 Alt. Rep. 529), the Court said: "In this suit at law the rights of the parties depend upon no general or special question of an equitable, as distinguished from a legal, character. This case is a simple one of breach of contract. The Lowell agreed that if it transferred the plaintiff's road to another company the plaintiff might take it back; and the Lowell has made the transfer it agreed not to make."

² *Boston, etc. R. Co. v. Boston, etc. R. Co.*, 65 N. H. 393 (1888), (23 Alt. Rep. 529). That a lessor railroad company has no *lien* upon the rolling stock of the lessee under the Iowa statute relating to landlord's liens, see *Trust Co. of North America v. Manhattan Trust Co.*, 77 Fed. 82 (1896).

³ *Southern R. Co. v. Franklin, etc. R. Co.*, 96 Va. 693 (1899), (32 S. E. Rep. 485, 44 L. R. A. 297).

to have that lease set aside, cancelled and amended. . . . And the court will declare the agreement at an end, and set aside, and cancelled, and will make such orders as will seem proper and right.”¹ Courts of equity have power, within well-defined limits, to annul written instruments, but that they have any such broad power as stated in this *dictum* would probably not have been the more deliberate opinion of the learned judge who wrote it.

II. *Liabilities of Lessor Corporation.*

§ 215. **Obligations of Lessor Corporation to State.**—A lease of its railroad does not affect a railroad company in its relations with the State. Its duties as a corporation exist after the execution of a lease to the same extent as before. It must fulfil the obligations imposed by its charter and, except when relieved by the State, must discharge all the duties to the State required of railroad companies generally.²

The right of the State, in the exercise of its reserved power, to alter, amend or repeal the charter of a railroad company, is not restricted by a lease of its railroad, and the State will deal with the lessor corporation, exclusively, in withdrawing or limiting any special powers or privileges theretofore granted.³

¹ “The Elevator Case,” 17 Fed. 204 (1881).

² In *New Hampshire* (Pub. Stat. & Sess. Laws 1901, ch. 156, § 45, p. 506), and *Texas* (Sayles’ Civ. Stat. (Supp. to 1900), vol. ii., ch. 15 a), it is provided that a lease shall not affect the public obligations of a lessor corporation.

An act authorizing a railroad company to lease its railroad to another corporation, and requiring the corporation lessee to be liable in the same manner as though the railway belonged to it, imposes a liability as to its leased property upon the lessee while operating it, but does not discharge the lessor corporation from its corporate liabilities.

Chicago, etc. R. Co. v. Crane, 113 U. S. 424 (1885), (5 Sup. Ct. Rep. 578).

³ In *Mayor, etc. of Worcester v. Norwich, etc. R. Co.*, 109 Mass. 113 (1871), the Supreme Judicial Court of Massachusetts said: “As the right of the legislature to alter, amend or repeal the charters of these corporations is absolute, and not dependent upon their consent, it is immaterial whether such consent has been given or not. Nor was notice of the appointment or the proceedings of the commissioners necessary to be given to parties not specified in the act; the terms of the act not requiring such notice . . . All these parties have derived their interests from the original corporations to whom the power to exercise the right of eminent domain was granted, and they hold these assigned and derivative interests

The obligation to pay taxes upon a railroad and other property, when leased, is considered in another section.¹

§ 216. **Lessor Corporation cannot avoid Statutory Obligations unless exempted.** — Statutes imposing obligations upon railroad companies in safeguarding their tracks are designed to protect the interests of the public. Public safety demands their observance.

Statutes of this character are generally construed to apply as well to the lessor as to the lessee corporation. Especially is the lessor liable where the statute imposing the obligation, expressly or by necessary inference, refers to the *owner* of the railroad. The owner of a railroad cannot shift the burden of such obligations by lease, unless expressly exempted from further liability. Mere legislative consent to a lease is not sufficient.

Upon these principles, statutes providing that railroad companies shall fence their tracks and maintain cattle guards, are generally held to impose the duty upon the lessor corporation, and to render it liable for all damages occasioned by a failure to comply therewith.² The fact that the lessee corpo-

under expressed or implied authority granted to those corporations by the legislature."

¹ See *post*, § 224: "*Taxation of Leased Railroads*."

² *United States*: *Hayes v. Northern Pacific R. Co.*, 74 Fed. 279 (1896).

California: *Fontaine v. Southern Pacific R. Co.*, 54 Cal. 645 (1880), (1 Am. & Eng. R. Cas. 159).

Illinois: *East St. Louis, etc. R. Co. v. Gerber*, 82 Ill. 632 (1876); *Toledo, etc. R. Co. v. Rumbold*, 40 Ill. 143 (1866).

Indiana: In this State, by statute, when the lessee operates the road in the name of the lessor, both lessor and lessee are liable for live stock killed on unfenced tracks, but when the lessee operates in its own name it is alone responsible. *Pittsburgh, etc. R. Co. v. Bolner*, 57 Ind. 572 (1877); *Pittsburgh, etc. R. Co. v. Hanon*, 60 Ind. 417 (1878); *Cincinnati, etc. R. Co. v. Bunnell*, 61 Ind. 183 (1878).

Iowa: *Clary v. Iowa Midland R. Co.*, 37 Iowa, 344 (1873); *Downing v. Chicago, etc. R. Co.*, 43 Iowa, 96 (1876).

Kansas: *St. Louis, etc. R. Co. v. Curl*, 28 Kan. 622 (1882), (11 Am. & Eng. R. Cas. 458); *Railroad Co. v. Wood*, 24 Kan. 625 (1880): "A distinction may be drawn between those statutory duties which require constant action on the part of those operating the road, such as ringing the bell at every crossing, and those which, like the one in question, are of the nature of permanent improvements."

In this case a railroad company was held liable for an injury occasioned by a failure to fence its road, although the injury occurred while it was in the hands of a receiver.

Maine: *Whitney v. Atlantic, etc. R. Co.*, 44 Me. 362 (1857).

In *New York*, however, the lessee and *not* the lessor has been held liable for injuries caused by failure to fence the road as required by statute. *Ditchett*

ration may also be liable does not affect the responsibility of the lessor. In *Toledo, etc. R. Co. v. Rumbold*,¹ the Supreme Court of Illinois said: "It was the duty of appellants to have fenced the road, and public safety demands that they should be held liable for all damages resulting from the neglect to fence it. And the same policy would require that the lessee should be responsible for presuming to use the road of another company, fenceless and unprotected. Either company would be liable for the injury."

Upon similar principles it is held that a lessor corporation — as the owner of the railroad — is liable, under statutes, for injuries sustained by adjoining proprietors from fires communicated by engines operated by the lessee.²

The lessor corporation is responsible, even for the torts of the lessee in the operation of the road, where the statute authorizing the lease contains a provision that its execution shall not exempt the lessor from any liability to which it would otherwise be subject, or other provision evidencing an intention that the lessor corporation should remain responsible for the proper operation of the leased railroad.³

v. Spuyten Duyvil, etc. R. Co., 67 N. Y. 425 (1876), and *Thorne v. Lehigh Valley R. Co.*, 88 Hun (N. Y.), 141 (1895), (34 N. Y. Supp. 525, 68 N. Y. St. Rep. 308). Since 1890, however, both lessor and lessee are liable by statute. Railroad Law 1890 and 1892, § 32.

¹ *Toledo, etc. R. Co. v. Rumbold*, 40 Ill. 145 (1866).

² *Illinois*. A railroad company which has leased its road to another company, under statutory authority, for ninety-nine years, will be liable for the destruction of property by fire caused by the negligence of the lessee, notwithstanding the legislature may have conferred upon the lessee all the power of the lessor company. There being no clause of exemption in the act of the legislature, the liability of the lessor continues. *Balsley v. St. Louis, etc. R. Co.*, 119 Ill. 68 (1886), (8 N. E. Rep. 859). See also *Railway Co. v. Campbell*, 86 Ill. 443 (1877).

Massachusetts: *Ingersoll v. Stock-*

bridge, etc. R. Co., 8 Allen, 438 (1864); *Davis v. Providence, etc. R. Co.*, 121 Mass. 134 (1876).

Maine: *Bean v. Atlantic, etc. R. Co.*, 63 Me. 295 (1873).

Missouri: *McCoy v. Kansas City, etc. R. Co.*, 36 Mo. App. 446 (1889).

North Carolina: *Aycock v. Raleigh, etc. R. Co.*, 89 N. C. 321 (1883).

In *South Carolina*, however, under a statute making a railroad company liable for damages caused by fire communicated by "its locomotive engine," it was held that a company was not liable for a fire communicated by the engine of its lessee.

Hunter v. Columbia, etc. R. Co., 41 S. C. 86 (1893), (19 S. E. Rep. 197); *Lipfield v. Charlotte, etc. R. Co.*, 41 S. C. 285 (1893), (19 S. E. Rep. 497).

³ *Quested v. Newburyport, etc. R. Co.*, 127 Mass. 204 (1879); *Stearns v. Atlantic, etc. R. Co.*, 46 Me. 95 (1858); *Fort Wayne, etc. R. Co. v. Heinebaugh*, 43 Ind. 354 (1873).

§ 217. Lessor cannot avoid Primary Obligations unless exempted. — Analogous to the rule that a railroad company, after the lease of its road, continues liable for any omission in the performance of duties imposed upon it by statute, is the rule that a lessor corporation, unless exempted, is responsible for any injury caused by a failure to fulfil its primary and positive obligations to the public. Thus, the duties of properly constructing and locating its railroad, bridges, and station houses, owed by the lessor corporation in the first instance, cannot be shifted to another corporation so as to absolve the lessor from liability, unless immunity is expressly granted by statute.¹ As said by the Supreme Court of Maine in *Nugent*

Under a statute providing that a lessor railroad company should remain liable for the acts of the lessee, it was held that the lessor was liable for permitting salt to remain on the tracks which attracted stock thereon, the stock being killed by a passing train. *Brown v. Hannibal, etc. R. Co.*, 27 Mo. App. 394 (1887).

In *California*, by statute the lessor is liable for personal injuries due to improper construction of road. *Lee v. Southern Pacific R. Co.*, 116 Cal. 97 (1897), (47 Pac. Rep. 932).

In *Mahoney v. Atlantic, etc. R. Co.*, 63 Me. 68 (1873), it was held that a provision that the lessor should not be exonerated by the lease from any existing liabilities left the lessor responsible for the torts, but not the contracts, of the lessee, and that a passenger assaulted by the lessee's servants upon its train had no right of action against the lessor because his demand was founded in contract.

This decision is not well founded in principle, for the passenger's right of action against the lessee for breach of its duty as a common carrier was clearly founded in tort.

Under the *Arkansas* statute (S. & H. Digest 1894, § 6349), providing that "all railroads which are now or may be hereafter built or operated in whole or in part in this State shall be responsible for all damages to persons and property

done or caused by the running of trains in this State," one who has obtained a judgment against the lessee of a railroad can enforce payment by seizure and sale of the road itself. *Little Rock, etc. R. Co. v. Daniels*, 68 Ark. 171, (1900), (56 S. W. Rep. 874). For another *Arkansas* statute upon this subject, see S. & H. Dig. 1894, § 6334.

In *Ohio* (Bates' Anno. Stat. (1787-1902,) § 3305), and *Texas* (Sayles' Civ. Stat. 1897 (Supp. to 1900) vol. ii. ch. 15 a), it is provided that the lessor corporation shall remain liable as if it operated the road.

¹ *United States* : In *Hayes v. Northern Pacific R. Co.*, 74 Fed. 282 (1896), Judge Jenkins said : "When there is due authority of law for the leasing of a railway, the company cannot, by leasing its line, discharge itself of those responsibilities which are imposed upon it by the law of its incorporation, and cannot relieve itself from liability in the discharge of those positive duties which it owes to the public, and have been specially imposed by its charter." See also *Arrowsmith v. Nashville, etc. R. Co.*, 57 Fed. 177 (1893).

Kansas : In *St. Louis, etc. R. Co. v. Curl*, 28 Kan. 622 (1882), (11 Am. & Eng. R. Cas. 458), Mr. Justice Brewer, then Judge of the Supreme Court of Kansas, said : "When the injury results from the omission of some duty, which the lessor itself owes to the public in the

*v. Railroad Co.*¹: "For an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of its road, station houses, etc., the charter company cannot, in the absence of statutory exemption, discharge itself of legal responsibility."

This rule is based upon considerations of public policy which disregard the lease in fixing liability. Like the rule respecting statutory duties, it relates to the direct obligations of the lessor corporation. The lessor is held responsible, under both rules, for its own omissions.² It is chargeable with the neglect of the lessee only as such neglect constitutes its own default. Whether the lease is authorized or unauthorized is immaterial.

The result of the operation of either rule may, moreover, under certain conditions, be obtained by the application of another and distinct principle. When the failure to fulfil a statutory obligation, or perform a public duty, results in a *nuisance*, the lessor, as well as the lessee, may be held responsible. The general principle of the law of landlord and tenant applies that both may be liable for a nuisance — the one for creating and the other for continuing it.³ Thus, two railroad companies — lessor and lessee — have been held lia-

first instance, — something connected with the building of the road, — then we think the company assuming the franchise cannot divest itself of the responsibility by leasing its track to some other company." See also *Railway Co. v. Wood*, 24 Kan. 619 (1880).

Maine: *Nugent v. Railroad Co.*, 80 Me. 62 (1888), (12 Atl. Rep. 797, 38 Am. & Eng. R. Cas. 52).

Michigan: A lessor is liable for an additional servitude imposed upon land by a lessee. Thus, where a railroad company condemned a right of way for the passing of trains over private property and leased the same to a lessee who used it not only for that purpose but for switching purposes, thus causing additional damage to the adjoining property, it was held that the owner of such property was entitled to recover additional compensation from the lessor. *Backus*

v. Detroit, etc. R. Co., 71 Mich. 645 (1888), (40 N. W. Rep. 60).

Pennsylvania: *Kearney v. Cent. R. Co.*, 167 Pa. St. 362 (1895), (31 Atl. Rep. 637).

¹ *Nugent v. Railroad Co.*, 80 Me. 76 (1888), (12 Atl. Rep. 797, 38 Am. & Eng. R. Cas. 52).

² *St. Louis, etc. R. Co. v. Curl*, 28 Kan. 622 (1882), (11 Am. & Eng. R. Cas. 458): "The injury resulted directly from its own wrong, and not from any mere negligence on the part of the [lessee] company. It cannot relieve itself by contracting with some other party to discharge its statutory duties."

³ *Arrowsmith v. Nashville, etc. R. Co.*, 57 Fed. 165 (1893); *Swords v. Edgar*, 59 N. Y. 28 (1874). Compare *Ditchett v. Spuyten Duyvil R. Co.*, 67 N. Y. 425 (1876), *Taylor's Landlord and Tenant*, § 175.

ble for an unlawful change of grade in the streets of a city, made before the lease and continued thereafter by the lessee;¹ and the same principle may be applicable where, notwithstanding statutes requiring fences, railroads are leased in an unfenced condition and are permitted to remain so.²

§ 218. **Liability of Lessor for Negligent Operation of Railroad** — (A) **Under Unauthorized Lease.** — As a corollary to the conclusion that a railroad corporation cannot lease its railroad and franchises without statutory authority, it follows that a lease executed without such authority is void. A lessor corporation, under an unauthorized lease, continues liable for all the negligence of the lessee affecting the public. In respect to third persons, the lessee stands in the relation of an agent to the lessor. The lessor is bound by its acts and responsible for its omissions.³

¹ *Railroad Co. v. Hambleton*, 40 Ohio St. 496 (1884).

The lessor corporation, as well as the lessee, is liable for an injury done by the lessor in building its track so as to cut off ingress to adjoining property and by the lessee subsequently using the same. *Stickley v. Chesapeake, etc. R. Co.*, 93 Ky. 323 (1892), (20 S. W. Rep. 261).

A lessor of a railroad is not liable for damages to adjacent land caused by the erection of an embankment in filling in a trestle, it not appearing that the trestle was insufficient at the time of the lease. *Miller v. New York, etc. R. Co.*, 125 N. Y. 118 (1890), (26 N. E. Rep. 35).

² *Arrowsmith v. Nashville, etc. R. Co.*, 57 Fed. 165 (1893). In *St. Louis, etc. R. Co. v. Curl*, 28 Kan. 622 (1882), (11 Am. & Eng. R. Cas. 458), the question is raised but not decided.

³ I. *Cases holding lessor corporation — under unauthorized lease — liable for injuries to passengers:*

United States: Railroad Co. v. Brown, 17 Wall. 445 (1873).

Georgia: Central R., etc. Co. v. Phinazee, 93 Ga. 488 (1894), (21 S. E. Rep. 66).

Iowa: Bower v. Burlington, etc. R. Co., 42 Iowa, 546 (1876).

Kentucky: Chesapeake, etc. R. Co. v. Osborne, 97 Ky. 112 (1895), (30 S. W. Rep. 21).

New York: Abbott v. Johnstown, etc. R. Co., 80 N. Y. 27 (1880).

South Carolina: Bouknight v. Charlotte, etc. R. Co., 41 S. C. 415 (1894), (19 S. E. Rep. 915).

Texas: International, etc. R. Co. v. Eckford, 71 Tex. 274 (1888), (8 S. W. Rep. 679).

West Virginia: Ricketts v. Chesapeake, etc. R. Co., 33 W. Va. 433 (1890), (10 S. E. Rep. 801); *Fisher v. West Virginia, etc. R. Co.*, 39 W. Va. 366 (1894), (19 S. E. Rep. 578).

II. *Cases holding lessor corporation — under unauthorized lease — liable for injuries to persons lawfully upon its tracks:*

Freeman v. Minneapolis, etc. R. Co., 28 Minn. 443 (1881), (10 N. W. Rep. 594, 7 Am. & Eng. R. Cas. 410); *Galveston, etc. R. Co. v. Gartesier*, 9 Tex. Civ. App. 456 (1895), (29 S. W. Rep. 939). See also *Briscoe v. Southern Kansas R. Co.*, 40 Fed. 273 (1889), (live stock).

III. *Miscellaneous cases stating general rule that lessor is liable for negligence of lessee in operation of road under unauthorized lease:*

United States: Welden Nat. Bank v. Smith, 86 Fed. 398 (1898); *Hayes v.*

“Shippers, who have a common-law right to demand of the common carrier that he shall carry their goods safely, passengers, who have a common-law right to demand of the common carrier that they shall be carried safely to their destination, and travellers upon the highway, who have a statutory and common-law right to such a reasonable and careful operation of the road as shall not unduly injure them in the pursuit of their lawful rights,” sustaining damages by the failure of a lessee, under an unauthorized railroad lease, to fulfil all the obligations required of railroad companies, may hold the lessor — as well as the lessee — responsible therefor.¹

§ 219. **Liability of Lessor for Negligent Operation of Railroad — (B) Under Authorized Lease.** — Extending the principle, already considered, that the approval by the legislature of a railroad lease is insufficient, without a clause of exemption, to release a lessor from the performance of its statutory duties and the fulfilment of its primary obligations, it is held by courts of high authority that an express exemption is also necessary to relieve a lessor from liability for injuries to third persons caused by the negligence of a lessee in the operation and management of a leased railroad; that although the lessor has, with statutory authority, parted with the control of its railroad, it is still liable for the torts of the lessee.²

Northern Pacific R. Co., 74 Fed. 282 (1896); *Hukill v. Maysville, etc. R. Co.*, 72 Fed. 745 (1896); *Arrowsmith v. Nashville, etc. R. Co.*, 57 Fed. 165 (1893).

Alabama: *Rome, etc. R. Co. v. Chasteen*, 88 Ala. 591 (1889), (7 So. Rep. 94).

District of Columbia: *Howard v. Chesapeake, etc. R. Co.*, 11 App. Cas. 300 (1897).

Idaho: *Palmer v. Utah, etc. R. Co.*, 2 Idaho, 350 (1888), (16 Pac. Rep. 553, 36 Am. & Eng. R. Cas. 443).

Illinois: *Railway Co. v. Dunbar*, 20 Ill. 623 (1858).

South Carolina: *Harmon v. Columbia, etc. R. Co.*, 28 S. C. 401 (1887), (5 S. E. Rep. 835).

Texas: *Railroad Co. v. Culberson*, 72 Tex. 375 (1888), (10 S. W. Rep. 706).

Vermont: *Nelson v. Railroad Co.*, 26 Vt. 717 (1854).

¹ *Hukill v. Maysville, etc. R. Co.*, 72 Fed. 752 (1896).

² *Connecticut*: In *Driscoll v. Norwich, etc. R. Co.*, 65 Conn. 230 (1894), (32 Atl. Rep. 354), it was said that a railroad company cannot, by a lease of its property, absolve itself from liability for an injury to a stranger, caused by the negligence of the lessee in the operation of the road, unless such exemption is provided for in the lease, and is also expressly sanctioned by legislative authority.

The conclusion of the Court in this case can, however, be justified on other grounds. See *post*, § 221: “*Liability of Lessor for Negligent Operation of Railroad — (D) When it shares in Control.*”

It is urged, in support of this position, that public policy requires that the obligations of a railroad corporation — to

Georgia: *Green v. Coast Line R. Co.*, 97 Ga. 27 (1895), (24 S. E. Rep. 814): "It is by reason of this firm adhesion of duty imposed to franchise granted that an incorporated railroad company cannot lease its line of railway and permit it to be operated by the lessee without being liable for negligent torts committed by the lessee, to the same extent as if they were committed by itself. . . . And this rigid rule of liability, which is directly the opposite of that which prevails touching leases where no charter franchises of a *quasi*-public nature are involved, is not relaxed in favor of a company having express permission from the legislature to make the lease, unless there be also an express exemption or grant of absolution from liability. Thus, in the case of a mere permissive lease of a railroad, there is a cumulative rather than diminished security to the injured citizen, who for a tort committed . . . by the lessee, in the exercise of franchises derived from the lessor, can hold either or both answerable for the damages."

In *Singleton v. South Western R. Co.*, 70 Ga. 464 (1883), (48 Am. Rep. 574), a lessor was held liable for injuries to a passenger upon lessee's train through the negligence of lessee's servants. This decision was placed upon the broad ground that a lessor is liable for the torts of its lessee even under an authorized lease, but might well have been based upon the privity of contract between the lessor and the passenger, for the *passenger's ticket was issued in the name of the lessor*. See also *Central R., etc. Co. v. Phinazee*, 93 Ga. 488 (1893), (21 S. E. Rep. 66); *Central R. Co. v. Brinson*, 64 Ga. 475 (1880).

Illinois: *Balsley v. St. Louis, etc. R. Co.*, 119 Ill. 68 (1886), (8 N. E. Rep. 859, 59 Am. Dec. 784); *Pennsylvania Co. v. Ellet*, 132 Ill. 654 (1890), (24 N. E. Rep. 559, 42 Am. & Eng. R. Cas. 64); *Peoria, etc. R. Co. v. Lane*, 83 Ill. 448 (1876).

Massachusetts: *Braslin v. Somerville Horse R. Co.*, 145 Mass. 68 (1887), 13 N. E. Rep. 65) (*per Allen, J.*): "It is nowhere stated that the lessor should be exonerated from responsibility, nor was it possible for the parties to make a contract which should have that effect. The sanction of the legislature was given the contract as made by the parties, but added nothing by way of exemption from the primary responsibility of the lessor. The lease did not purport to transfer the lessor's franchise, or the whole of its property. The lessor was not going out of business entirely, but only leased a portion of its road, with provisions for restoration of the leased property at the end of the term, and for re-entry. It was under a positive duty and obligation to the public, and the consent of the legislature to the making of the lease did not imply a discharge from the duty and obligation. Indeed, there is a certain implication that the parties did not contemplate any such discharge, arising from the stipulation for indemnity "during said term," that is, during the whole term of the lease. Where a corporation seeks to escape from the burdens imposed upon it by the legislature, clear evidence of a legislative assent to such exoneration should be found."

In the earlier Massachusetts case of *Quested v. Newburyport Horse R. Co.*, 127 Mass. 204 (1879), a lessor was held liable to persons injured through the negligence of the lessee, but in that case it was expressly provided by statute that the lease should not "release or exempt such company from any duties, liabilities or restrictions to which it would otherwise be subject."

Nebraska: In *Chollette v. Omaha, etc. R. Co.*, 26 Neb. 159 (1889), (41 N. W. Rep. 1106), where a passenger was injured through the negligence of the lessee's employees, it was held that, upon grounds of public policy, the original obligation of a railroad company to

persons using its road as passengers and shippers, to travelers upon highways crossed by its tracks — should not be discharged by a lease of its property and franchises to another corporation unless it is exempted from liability by legislative authority; that when a corporation seeks to escape from the burdens imposed upon it, clear evidence of legislative assent to such exoneration must be shown, which is not furnished by a mere approval of the transfer of its property and franchises. As tersely expressed by the Supreme Court of Georgia in *Singleton v. South Western R. Co.*¹: “The view which we take of the law and the cases cited is that the original obligations can only be discharged by legislative enactment consenting to and authorizing the lease, with an exemption to the lessor company.”

On the other hand, it is said by courts of equally high authority that the legislature, by sanctioning a lease, gives its consent that the lessee shall stand as a substitute for the lessor with respect to all matters arising out of the future management and control of the leased railroad. It is held by these courts that a lessor having, with the approval of the legislature, leased and entirely parted with the possession

the public cannot be discharged by a transfer of its franchises to another company, except by legislative enactment consenting to and authorizing such transfer, with an exemption granted to such company relieving it from liability; that mere legislative consent to the transfer is not sufficient, there must be a release from the obligations of the company to the public.

North Carolina: *Pierce v. North Carolina R. Co.*, 124 N. C. 83 (1899), (32 S. E. Rep. 399); *Kinney v. North Carolina R. Co.*, 122 N. C. 961 (1898), (30 S. E. Rep. 313); *Logan v. North Carolina R. Co.*, 116 N. C. 940 (1895), (21 S. E. Rep. 959).

South Carolina: In *Harmon v. Columbia, etc. R. Co.*, 28 S. C. 401 (1888), (5 S. E. Rep. 835), a lessor was held liable for stock killed through negligence of lessee. In *Parr v. Spartans-*

burgh, etc. R. Co., 43 S. C. 197 (1895), (20 S. E. Rep. 1009), the Court went the extreme length of holding a lessor liable for the torts of a receiver of the lessee. This holding that a lessor is responsible for the management of property *in custodia legis* cannot be justified upon principle or authority. See also *Hart v. Railroad Co.*, 33 S. C. 427 (1890), (12 S. E. Rep. 9); *Chester Nat. Bank v. Atlanta, etc. R. Co.*, 25 S. C. 216 (1886).

Tennessee: In *Hanna v. Railway Co.*, 88 Tenn. 310 (1889), (12 S. W. Rep. 718), a railroad company was held not liable for an injury to an employee of a contractor, but the Court remarked that both “sanction and exemption” were necessary to relieve a lessor.

Texas: *Central, etc. R. Co. v. Morris*, 68 Tex. 49 (1887), (3 S. W. Rep. 457).

¹ *Singleton v. South Western R. Co.*, 70 Ga. 469 (1883), (48 Am. Rep. 574).

and control of its railroad, is not liable for the torts of the lessee; that legislative exemption is not necessary in addition to legislative sanction.¹

In *Arrowsmith v. Nashville, etc. R. Co.*,² Judge Lurton distinguished the case where statutory exemption is necessary from that where statutory sanction is sufficient: "Where obligations are imposed by charter or statute law upon a railroad company for the protection and advantage of the general public not having contract relations with it, it may very well

¹ *United States*: *Hayes v. Northern Pacific R. Co.*, 74 Fed. 282 (1896), (Jenkins, J.): "It is, however, a different question when the lessor company is sought to be made liable for the negligent management of the road which it was authorized to lease, and of which management it had no control. In such case, we perceive no ground of public policy which should impose such liability upon the lessor company with respect to injuries resulting to individuals from the negligent operation of the railway. The subject has been much discussed, and some of the cases are characterized by lack of discrimination between liability for duties absolutely imposed by law upon the lessor company and duties arising from the manner of the operation of trains."

Also *Arrowsmith v. Nashville, etc. R. Co.*, 57 Fed. 165 (1893), (a leading case).

Arkansas: *Little Rock, etc. R. Co. v. Daniels*, 68 Ark. 171 (1900), (56 S. W. Rep. 874).

Kansas: *St. Louis, etc. R. Co. v. Curl*, 28 Kan. 623 (1882): "If the injury results from negligence in the handling of trains or in the omission of any statutory duty connected with the management of the road, matters in respect to which the lessor company could, in the nature of things, have no control — then the lessee company will alone be responsible."

See also *Caruthers v. Kansas City, etc. R. Co.*, 59 Kan. 629 (1898), (54 Pac. Rep. 673).

Maine: *Nugent v. Railroad Co.*, 80

Me. 76 (1888), (12 Atl. Rep. 797): "An authorized lease, without any exemption clause, absolves the lessor from the torts of the lessee resulting from the negligent operation and handling of its trains and the general management of the leased road, over which the lessor could have no control."

See also *Mahoney v. Atlantic, etc. R. Co.*, 63 Me. 68 (1873).

Minnesota: *Heron v. St. Paul, etc. R. Co.*, 68 Minn. 542 (1897), (71 N. W. Rep. 706).

New Hampshire: *Murch v. Concord R. Co.*, 29 N. H. 1 (1854).

New York: *Phillips v. Northern R. Co.*, 41 N. Y. St. Rep. 780 (1891), (16 N. Y. Supp. 909). In *Ditchett v. Spuyten, etc. R. Co.*, 67 N. Y. 425 (1876), it was held that a railroad corporation which had parted with the possession and control of its road under a lease thereof to another corporation, containing a covenant that the lessees should keep up the fences was not liable to one travelling upon a highway, for damages resulting from an omission of the lessee to repair a fence which was in good order at the time of the lease and surrender of possession.

See also *Miller v. Railroad Co.*, 125 N. Y. 118 (1890), (26 N. E. Rep. 35).

Pennsylvania: *Pinkerton v. Philadelphia Traction Co.*, 193 Pa. St. 229 (1899), (44 Atl. Rep. 284).

Virginia: *Virginia, etc. R. Co. v. Washington*, 86 Va. 629 (1890), (10 S. E. Rep. 927).

² *Arrowsmith v. Nashville, etc. R. Co.*, 57 Fed. 177 (1893).

be said that a general authority to lease out its road, which contains no provision exempting it from such public obligations, will not absolve it from liability. So, if a railway be in such condition that it is a nuisance when leased out by reason of the absence of something necessary to its safe operation, or the presence of something dangerous to its safe operation, and this nuisance be continued by the lessee, both the lessor and lessee would be liable,—the one as having created, and the other as having continued the nuisance. But to say that, after the lessor has, by authority of law, transferred the control and management of its road to another, he shall, unless especially exempted, remain liable for all the torts and contracts of the lessee, is to ignore the contract of lease and the legislative sanction under which it was made. The State, on grounds of public policy, may well refuse its consent to the transfer; but, if it consent, then there is no public policy to authorize the courts to say that the responsibility for the future management and operation of the road has not been exclusively imposed upon the lessee as the lawful substitute, for the company owning the road.”

Upon principle there is no obvious reason why, when the legislature has authorized a railroad company to lease its railroad, and it has exercised the power conferred and has entirely parted with the control of the leased property, it should still be responsible for the negligence of the lessee in the operation of the road. The doctrine of *respondeat superior* has no application, for the lessee is the owner *pro hac vice*. The legislature has passed upon considerations of public policy in authorizing the lease. Under these conditions, it would seem that the privileges and corresponding obligations should both pass to the lessee in the manner of other property, and that the general principle that a landlord is not responsible for the negligence of his tenant in the management of the leased property should be applicable and controlling.

§ 220. **Liability of Lessor for Negligent Operation of Railroad** — (C) **To Employees of Lessee.** — The rule that a lessor corporation, under an unauthorized lease, is responsible to third persons for the negligence of the lessee, is, upon principles

already illustrated, well settled.¹ A similar rule, in favor of the employees of the lessee, has been adopted by the Supreme Court of North Carolina, upon the theory that the original obligation of the lessor to compensate its own servants for injuries received enures to the benefit of the servants of the lessee.²

The doctrine is fundamentally unsound. The obligations of the lessor to its own servants grew out of the contract of employment. Their duties were reciprocal. But after the lease of a railroad there is no privity of contract between the lessor and the servants of the lessee. An employee of the lessee owes the lessor no duty, and the lessor owes him no corresponding obligation. Upon principle and authority it is clear that the lessor corporation is not liable to an employee of the lessee for injuries sustained through the negligence of the lessee in the operation of the road, even though the lease is without legislative authority. "To his own master he standeth or falleth."³

¹ *Ante*, § 218: "*Liability of Lessor for Negligent Operation of Railroad — (A) Under Unauthorized Lease.*"

² In *Logan v. North Carolina R. Co.*, 116 N. C. 949 (1895), (21 S. E. Rep. 959), the Court said: "If we apply the test which we hold to be the true one, that the liability of the lessor grows out of the duty imposed with the privilege in the first instance, the same reason is found to exist for holding it liable to servants of the lessee for injuries sustained by them, as for injuries inflicted on passengers. A part of the original duty imposed by the charter was to compensate servants in damages for any injuries they might sustain, except such as should be due to the negligence of their fellow-servants. The employee is deemed in law to contract ordinarily to incur such risks as arise from the carelessness of the other servants of the company, but where the lessor company would be liable, if it remained in charge of the road, to a person acting as its own servant, we see no reason why it should not be answerable to him when employed by the lessee. *Its implied obligation in the first instance — to come*

back to the touchstone — was to compensate its own servants for injuries due to any cause other than the carelessness of their fellows, and the same rule must apply in its relation with the servants of the lessee."

In *Macon, etc. R. Co. v. Mayes*, 49 Ga. 355 (1873), the Court held, generally, that a lessor, under an unauthorized lease, is liable to an employee of the lessee for injuries caused by the negligent operation of the road, but in that case the negligence was actually that of the lessor itself. Compare *Galveston, etc. R. Co. v. Daniels*, 9 Tex. Civ. App. 253 (1894), (28 S. W. Rep. 548).

³ *Hayes v. Northern Pacific R. Co.*, 74 Fed. 279 (1896); *Hukill v. Maysville, etc. R. Co.*, 72 Fed. 745 (1896); *Baltimore, etc. R. Co. v. Paul*, 143 Ind. 23 (1895), (40 N. E. Rep. 519); *Virginia Midland R. Co. v. Washington*, 86 Va. 629 (1890), (10 S. E. Rep. 927); *Buckner v. Richmond, etc. R. Co.*, 72 Miss. 873 (18 So. Rep. 449); *Hanna v. Railway Co.*, 88 Tenn. 310 (1889), (12 S. W. Rep. 718); *Baxter v. New York, etc. Co.* (Tex. 1893), (22 S. W. Rep. 1002). In *East Line, etc. R. Co. v. Culber-*

A fortiori, the employees of the lessee corporation have no right of action against the lessor for the negligence of the lessee when the road is operated under an *authorized* lease.¹

The rules already considered, however, that a lessor corporation is liable for any failure in the performance of its own statutory and primary duties, unless expressly exempted,² are applicable in favor of employees of the lessee, as well as other persons. Thus, a lessor may be liable to such employees for injuries caused by the improper construction of a station-house,³ and by defects in the road-bed where the owner is charged with the duty of keeping it up.⁴

son, 72 Tex. 379 (1888), (10 S. W. Rep. 706, 3 L. R. A. 567, 38 Am. & Eng. R. Cas. 225), where a conductor upon a train of a lessee corporation, under an unauthorized lease, was injured by the negligence of the lessee in supplying a defective engine and employing a careless engineer, the Court said: "The duties which are owed by a railroad company to its servants are not duties owed to him in common with the public, but grow out of the contract of service. He assumes the relation of servant to his employer voluntarily, and out of it arises the reciprocal obligations from one to the other. It seems to us that the relation of the servant of the company operating the road to the owner is very different from his relation to his employer, and that the relation of the owner of the road to him is different from its relation to the general public. His contract is not with the company owning the road, and, it may be asked, does the latter owe him the duty of a master to a servant, or guarantee that the master with whom he has voluntarily contracted, will perform its obligation to him? It may be that if the injury had occurred by reason of a defect in the road-bed or track and not by reason of a defect in the engine, the company charged with the duty of keeping up the road would be liable. But if it were true that the injury was caused entirely by another company operating

the owner's road, and was inflicted upon one of its own employees by reason of a defect in machinery entirely under its control, it is difficult to see upon what principle of policy or justice the lessor should be held liable merely because it owned the road."

¹ Virginia Midland R. Co. v. Washington, 86 Va. 629 (1890), (10 S. E. Rep. 927). See also cases cited in preceding note.

Contra, Logan v. North Carolina R. Co., 116 N. C. 940 (1895), (21 S. E. Rep. 959).

² See *ante*, § 216: "*Lessor cannot avoid Statutory Obligations unless exempted*;" *ante*, § 217: "*Lessor cannot avoid Primary Obligations unless exempted*."

³ Nugent v. Boston, etc. R. Co., 80 Me. 62 (1888), (12 Atl. Rep. 797). The lessor has, however, been held not liable for injuries received by an employee of the lessee when the proximate cause of the injury was the running of the train by a co-employee, although a defective railroad platform contributed to the injury. Evans v. Sabine, &c. R. Co., (Tex. 1892), (18 S. W. Rep. 493). See also Jones v. Georgia Southern R. Co., 66 Ga. 558 (1881).

⁴ East Line, etc. R. Co. v. Culbertson, 72 Tex. 375 (1888), (10 S. W. Rep. 706, 3 L. R. A. 567, 38 Am. & Eng. R. Cas. 225); Galveston, etc. R. Co. v. Daniels, 9 Tex. Civ. App. 253 (1894), (28 S. W. Rep. 548). See, however,

§ 221. **Liability of Lessor for Negligent Operation of Railroad** — (D) **When it shares in Control.** — A cogent reason why a railroad corporation which has, with legislative sanction, leased and turned over the possession of its road to another company, should not be held responsible for the torts of the lessee, is that they are committed by persons over whom it has no control, upon property in the exclusive possession of another. This reason fails when the lessor, having leased its railroad, retains any part in its control. Thus, for example, where a lease provided that the managing agent of the leased road should be satisfactory to the lessor, and that its treasurer should receive and disburse the earnings,¹ it was held that the lessor, as well as the lessee, was responsible for all injuries to the public through the negligent operation of the road. Where the control retained amounts to joint management, the lessor is undoubtedly liable for injuries to employees equally with the lessee.

Upon other principles — contractual liability and estoppel — the lessor corporation will be held responsible where it allows the lessee to use its name in the operation of the leased road and in the issue of tickets for travel thereon.²

In *Railroad Co. v. Brown*³ the Supreme Court of the United States said: "The holder of such a ticket contracts for carriage with the company, not with the lessees and receiver.

Murch v. Concord R. Corp., 29 N. H. 9 (1854).

¹ In *Driscoll v. Norwich, etc. R. Co.* 65 Conn. 230 (1894), (32 Atl. Rep. 354), the Court held a lessor corporation responsible for the negligence of its lessee upon several grounds, and, while some of them seem opposed to the current of authority, the following ground, as stated by Chief Justice Andrews (p. 254), is unexceptionable: "The defendant preserves to itself an absolute control over all business done by the lessee upon the leased property, by requiring that the managing agent to be appointed by the lessee shall be a person satisfactory to itself; that its own treasurer shall collect all the money received from and the earnings of the leased property, and

have possession of the same; from which he shall pay all the expenditures and dues incurred in respect to the property demised, all taxes, assessments, and other liabilities, and shall, at the end of each six months, pay to himself for and on account of the defendant, the semi-annual rent due by the terms of the contract, and the balance, if any, deliver over to the lessee, the said New York and New England Railroad Company."

² *Bower v. Burlington, etc. R. Co.*, 42 Iowa, 546 (1876); *Singleton v. Southwestern R. Co.*, 70 Ga. 464 (1883); *Harmon v. Columbia, etc. R. Co.*, 28 S. C. 401 (1887), 5 S. E. Rep. 835.

³ *Railroad Co. v. Brown*, 17 Wall. (U. S.) 451 (1873).

Indeed, there is nothing to show that Catherine Brown knew of the difficulties into which the original company had fallen, nor of the part performed by the lessees and receiver in operating the road. She was not required to look beyond the ticket, which conveyed the information that this road was run, as railroads generally are, by the chartered company. Besides, the company, having permitted the lessees and receiver to conduct the business of the road in this particular, as if there were no change of possession, is not in a position to raise any question as to its liability for their acts."

§ 222. **Liability of Lessor upon Contracts of Lessee.**—When a railroad company leases its railroad to another corporation, with or without legislative authority, it is not liable upon contracts made by the lessee with third persons, not relating to the performance of its duties to the public.¹ There is no privity between the lessor and the parties to such contracts, nor are there reasons of public policy which require that the lessee should be considered the agent of the lessor in their execution.

Contracts of the lessee relating to the discharge of the lessor's public duties stand upon a different basis. In case of an unauthorized lease, the lessee, in the operation of the road, is treated as the agent² of the lessor, and the lessor may be held responsible, in actions *ex contractu* upon contracts of carriage and in actions *ex delicto* for any failure to perform the obligations imposed by law upon common carriers.³ The

¹ Pittsburgh, etc. R. Co. v. Harbaugh, 4 Brewst. (Pa.) 115 (1870). Compare International, etc. R. Co. v. Thornton, 3 Tex. Civ. App. 197 (1893), (22 S. W. Rep. 67).

A lessor is not liable for construction work done by contractors having contracts solely with the lessee. St. Louis, etc. R. Co. v. Ritz, 30 Kan. 30 (1883), (1 Pac. Rep. 27).

² In Nelson v. Vermont, etc. R. Co., 26 Vt. 721 (1854), Judge Redfield used this comprehensive language: "The lessors must, at all events, be held responsible for just what they expected

the lessees to do, and probably, for all which they do do, as their general agents. For the public can only look to that corporation to whom they have delegated this portion of the public service."

It is incorrect to say, however, that the lessee is the *general* agent of the lessor, except so far as relates to the performance of its public duties.

³ Chester National Bank v. Atlanta, etc. R. Co., 25 S. C. 216 (1886).

Lessor is liable for lessee's failure to carry goods. Central, etc. R. Co. v. Morris, 68 Tex. 49 (1887), (3 S. W. Rep.

foundation of liability in each case is the same. The lessee is agent of the lessor because the public have the right to look to the corporation to which they have delegated the performance of public duties. The lessor is responsible for the negligence of the lessee because it cannot, by its own action, absolve itself from its obligations to the public.¹

The foundation of the lessor's liability in actions *ex contractu* being the same as that in actions *ex delicto*, the liability of a lessor, under an authorized lease, upon the contracts of the lessee is determinable according to the principles, already considered, which fix its liability for negligence. In the jurisdictions which require an express legislative exemption to relieve a lessor in the case of negligence, it is, undoubtedly, necessary in the case of a contract. If legislative sanction is sufficient in the one case, it is sufficient in the other.²

§ 223. **Liability of Lessor for Reconstruction and Repairs.** — At common law, in the absence of an express covenant in the lease, the lessor was not bound to repair or rebuild, or to allow the lessee compensation for repairs made without his authority. The lessee took the leased property as he found it, and there was no implied covenant or warranty on the part of the lessor in regard to the property, its continuance in its existing condition through the term, or its availability for the purposes for which it was leased.

These principles, except as they have been modified by statute, are still of general application and apply where the property leased is a railroad. A railroad company, leasing its railroad, remains under no obligation, unless it is so provided in the lease, to rebuild bridges or other similar property, whether regarded as repairs, reconstruction or substitution,

457). Lessor is liable for goods received by it to be carried by its lessee, a foreign corporation. *Langley v. Boston, etc. R. Co.*, 10 Gray (Mass.), 103 (1857).

¹ The foundation of liability in actions *ex delicto* and actions *ex contractu* is that the company, by accepting its charter, has assumed obligations from which it cannot absolve itself by leasing its road to another company; and as

such company is not only under obligations to carry passengers safely but also to deliver goods intrusted to it for transportation, the same principles apply in either case. *Chester National Bank v. Atlantic, etc. R. Co.*, 25 S. C. 216 (1886).

² See *ante*, § 219: "*Liability of Lessor for Negligent Operation of Railroad — (B) Under Authorized Lease.*"

or to reimburse the lessee corporation or its receiver for any such improvements made upon the leased road without its authority.¹

§ 224. **Taxation of Leased Railroads.** — The exercise of the taxing power is evidenced entirely by statutes which, in the different States, vary widely in their provisions.

Especially is this true in the matter of the taxation of railroad companies. The method of assessment, whether upon earnings, capital stock or property, and the manner of collection, are governed by statutes of essentially different character in different States. The respective obligations of lessor and lessee corporations to pay taxes, the question whether leasehold interests are taxable separately from the fee, and the obligations of foreign lessor corporations regarding taxes, may also properly be determined by statutory provisions.²

¹ *Felton, Receiver, v. City of Cincinnati*, 95 Fed. 336 (1899). In this case a receiver was appointed, at the suit of creditors and stockholders, for the property of a railroad company whose only interest in the road it operated was a leasehold for a term of years. The lessor was not a party to the suit. It was held that the principles upon which courts authorize expenditures by receivers of railroads in foreclosure suits for necessary improvements, and charge the cost as a first lien on the property, do not authorize a court to charge the cost of bridges rebuilt by a receiver under order of the court upon the lessor's interest in the property, where the lease gives the lessee no right to make such improvements at the lessor's expense.

² *Arkansas*. San. & H. Dig. 1894, § 6333: If a railroad company of another State leases a railroad in this State such part of the railroad as is within this State is subject to taxation.

Kansas. G. S. 1897, ch. 70, § 96: Nothing in the provisions authorizing leases of railroads to foreign corporations shall be construed as curtailing any rights of the State, or counties, etc. of this State, through which road is located, to levy and collect taxes on the

same, in conformity with the provisions of the laws of this State.

Missouri. R. S. 1899, § 1060: Similar to Arkansas provision, *supra*.

Montana. Code 1895, § 923: Similar to Kansas provision, *supra*.

Nebraska. Comp. Stat. 1901, § 1768: Lessees of railroads "shall cause the same to be listed for taxation." *Ib.* § 4026: Similar to Kansas provision, *supra*.

North Carolina. Pub. Laws 1895, ch. 116, § 40, p. 127: Where a railroad is operated in this State by virtue of a lease, taxes shall be paid by the lessee and may be charged against, and deducted from, any payments due or to become due the lessor on account of the lessee or otherwise.

Ib. § 48, p. 151: If the property of any railroad company be leased or operated by any other corporation, foreign or domestic, the property of the lessor shall be subject to taxation.

South Dakota. Anno. St. 1901, § 3906: Nothing in the provisions of the statute authorizing leases shall curtail the right of the State and counties through which the road is located, to levy and collect taxes; and all roads leased or purchased shall be subject to taxation.

Wyoming. R. S. 1899, § 3206:

As a general rule in America, real estate is taxable as a whole, without regard to separate estates of different persons therein,¹ and is assessed in the name of the *lessor* — as owner — rather than in the name of the lessee.² These principles are applicable to railroads, in the absence of controlling statute, and must be followed irrespective of covenants in the lease, which merely determine the obligations of the parties between themselves.³

An exception to the general rule that, in the absence of a governing statute, taxes are assessed in the name of the lessor, has, sometimes, been made in the case of leases in perpetuity, and might properly be made in the case of other long term railroad leases. These exceptions, however, in no way modify the principle, for a lessee, under such a lease, is treated, for purposes of taxation, as the *owner*, and the lease is equivalent to a conveyance in fee in consideration of an annuity.⁴

Similar to South Dakota provision, *supra*.

¹ Cooley on Taxation, p. 288.

² In Rutland R. Co. v. Central Vermont R. Co., 63 Vt. 25 (1890), (21 Atl. Rep. 262), the Supreme Court of Vermont said regarding a tax on earnings: "Under the original as well as the modified lease no provision for the payment of taxes was made. The lease being silent, the duty to pay, under the common law, rested upon the lessor."

See also Irvin v. New Orleans, etc. R. Co., 94 Ill. 105 (1879); Wood's Landlord and Tenant, p. 685; Taylor's Landlord and Tenant, pp. 341, 395.

In Maryland the general principle that the lessor is bound to pay all State and municipal taxes is modified by statutes requiring the lessee to pay them but giving him, in the absence of other agreement, the right to recover the amount paid from the lessor or to deduct it from the rent. Philadelphia, etc. R. Co. v. Appeal Tax Court, 50 Md. 397 (1879).

Upon the principle that only the owners of railroads are liable for assessments, it has been held that the lessee of a railroad cannot be held liable for a

ditch assessment. Baltimore, etc. R. Co. v. Pansch, 7 Ohio N. P. 624 (1896).

Under a New Mexico statute providing that leased property shall be taxed to the lessor unless listed by the lessee, railroad property, held under lease, cannot be assessed against the lessee unless so listed. Valencia County v. Atchison, etc. R. Co., 3 N. M. 677 (1886), (10 Pac. Rep. 294).

³ *Ante*, § 205: "Covenant to pay Taxes."

⁴ Where the charter of a railroad company authorized it to acquire, by lease or purchase, any necessary extension of its road, and provided that all property so acquired should become part of its property, and in pursuance thereof it leased other railroads forever, and provided in the leases that the roads so leased should become and be operated as a part of its main line, it was held that the leased railroads would, if not for all purposes, at least for the purposes of taxation, be regarded as the property of the lessee. Huck v. Chicago, etc. R. Co., 86 Ill. 352 (1877). See also Appeal Tax Court v. Western Maryland R. Co., 50 Md. 274 (1879); Commonwealth v. Nashville, etc. R.

CHAPTER XX.

RIGHTS AND LIABILITIES OF LESSEE CORPORATION.

I. *Rights and Remedies of Lessee Corporation.*

§ 225. Rights of Lessee in General. Incidental Franchises.

§ 226. Rights of Lessee in Matter of Tolls.

§ 227. Mortgages of Leases.

§ 228. Remedies of Lessee Corporation.

II. *Liabilities of Lessee Corporation.*

§ 229. Obligation of Lessee to perform Lessor's Public Duties.

§ 230. Statutory Liability of Lessee.

§ 231. Liability of Lessee for Torts in Operation of Road under Authorized or Unauthorized Lease.

§ 232. Joint Liability of Lessor and Lessee.

§ 233. Liability of Lessee for Debts of Lessor.

I. *Rights and Remedies of Lessee Corporation.*

§ 225. **Rights of Lessee in General. Incidental Franchises.** — Under a lease of a railroad and franchises, by legislative authority, the lessee, as a general rule, succeeds to all the rights and privileges of the lessor and is entitled to the full enjoyment of the property leased.¹ But the lessee acquires by the lease no rights superior to those enjoyed by the lessor. The power to lease does not imply power to transfer greater privileges than the lessor possesses.² A lessee takes the benefit of contracts for the use of railroad property, entered into by the lessor with other corporations;³ and may purchase the leasehold interests of the lessor in connecting lines.⁴ And where

Co., 93 Ky. 430 (1892), (20 S. W. Rep. 383). Compare *State v. Housatonic R. Co.*, 48 Conn. 44 (1880).

¹ *Fisher v. New York, etc. R. Co.*, 46 N. Y. 644 (1871); *Chicago v. Evans*, 24 Ill. 52 (1860).

In *Pennsylvania* (Bright. Pur. Dig. 1894, § 123, p. 1804) the lessee corporation may indorse, guarantee or otherwise become liable for, or assume the principal and interest of, bonds of the lessor corporation.

² *Nibbs v. Chicago, etc. R. Co.*, 39 Iowa, 344 (1874): "It (the lessee) can

exercise no right which its lessor could not. If that corporation had no right to use the land and may be restrained from operating its road, the lessee acquired no higher or superior right under its lease, which could not transfer privileges the lessor did not possess." See also *McMillan v. Michigan, etc. R. Co.*, 16 Mich. 79 (1867).

³ *London, etc. R. Co. v. South-eastern R. Co.*, 8 Ex. (W. H. & G.) 584 (1853).

⁴ *Philadelphia, etc. R. Co. v. Catawissa R. Co.*, 53 Pa. St. 20 (1866).

a portion of the leased property is taken by process of condemnation for the use of another corporation, the lessee is entitled to the use of the money awarded as compensation, during the remainder of the term of the lease.¹

A lessee taking, under a lease, a railroad, without other words of description in the lease or governing statute, takes, as incidental thereto, such rights and franchises as are necessary for the continued operation of the road.² Only such rights and franchises, however, as are *essential* to such purpose are so acquired, and, as already shown, the lessee, under statutory authority to take a lease of a railroad, does not succeed to the prerogative franchises of the lessor.³

§ 226. *Rights of Lessee in Matter of Tolls.* — Upon the principle that a lessee corporation, in operating a leased road, exercises only derivative franchises,⁴ it has been held that a lessee, in taking over the railroad of the lessor, is entitled to charge the rates of fare fixed by the charter of the lessor, without regard to the rates prescribed in its own.⁵

But while the rates fixed in the owner's charter may limit — as a condition — the tolls collectible upon the leased road, the privilege of charging a greater rate of fare than authorized

¹ Where a railroad lease included all lands reasonably useful and convenient in operating a railroad, and another railroad company condemned a piece of land which might be useful although not then in use, it was held that the land was included in the lease and that the lessee was entitled to the use of the money awarded as damages for such taking, during the continuance of the lease. *Matter of New York, etc. R. Co.*, 49 N. Y. 414 (1872).

² See *ante*, § 157: "*Essential Franchises pass upon Sale of Railroad.*"

³ See *ante*, § 210: "*Lessor Corporation retains Prerogative Powers. Right of Eminent Domain.*"

⁴ Where one railroad company leases the rights and property of another railroad company, all corporate rights exercised by the lessor in the operation of the leased road are referable to the

chartered rights of the lessor. *McCandless v. Richmond, etc. R. Co.*, 38 S. C. 103 (1892), (16 S. E. Rep. 429).

⁵ Where one railroad company leased the road of another with all its rights, powers, privileges, etc., it was held that the lessee, in using the lessor's road, was not subject to the charges fixed by its own charter as to toll, but to the regulations in the charter of the lessor. *Pennsylvania R. Co. v. Sly*, 65 Pa. St. 205 (1870). See also *Fisher v. New York, etc. R. Co.*, 46 N. Y. 652 (1871).

A lease on the basis of a division of the net profits from the lessor's and lessee's road combined gives the lessor no claim on earnings from new roads subsequently built or acquired by lessee. *Murch v. Eastern R. Co.*, 43 N. H. 515 (1862).

in the lessee's charter or in general laws applicable to it, can only be transferred by lease where the statute permits the transfer and the lease distinctly includes the privilege.¹

§ 227. **Mortgages of Leases.** — A railroad corporation, having power to mortgage its property to secure its bonds, may mortgage its leasehold interest in a railroad, as well as other property, and such an interest will pass whenever comprehended, expressly or by implication, in the terms of the mortgage.² So, also, a leasehold of a railroad acquired subsequently to the execution of a mortgage may be included within its "after acquired property" clause whenever it clearly appears from the language that leasehold estates were intended to be embraced. Thus, a railroad mortgage covering "all the corporate rights, privileges, franchises, and immunities, and all things in action, contracts, claims, and demands of the said party of the first part, whether now owned or hereafter acquired in connection or relating to said railroad," has been held to include a subsequently acquired lease of a connecting road.³

Where a mortgage, made by a railroad company, provided that it should include all property subsequently acquired by the mortgagor, it was held that it included a railroad with its appurtenances subsequently leased, and that the title thereto was valid as against the assignee of the mortgagor.⁴

On the other hand, however, a lease, executed by a mortgagor after the execution of a mortgage, creates no privity of estate or contract between the mortgagee and the lessee, and a covenant of the lessee to make advancements cannot be treated as "after acquired property," within the meaning of that phrase as used in mortgages.⁵

§ 228. **Remedies of Lessee Corporation.** — The fact that a

¹ See *ante*, § 161: "*Right to fix Rates of Fare. Chartered Rates.*"

The lessee can collect only the tolls stated in the lessor's charter though less than its own. *McGregor v. Erie R. Co.*, 35 N. J. L. 89 (1871).

² *Beekman v. Hudson River, etc. R. Co.*, 35 Fed. 3 (1888).

³ The *Iowa* statute (Code 1897, § 2067)

authorizes the mortgaging of leases to secure construction bonds.

⁴ *Columbia, etc. Co. v. Kentucky Union R. Co.*, 60 Fed. 794 (1894).

⁵ *Barnard v. Norwich, etc. R. Co.*, 14 N. B. R. 469 (1876).

⁶ *Moran v. Pittsburgh, etc. R. Co.*, 32 Fed. 878 (1887).

railroad company takes a lease of a railroad, manifestly affects, in no way, its remedies against third persons.

The demands of a lessee against a lessor corporation depend upon the terms of the lease. In enforcing these demands and establishing its rights as lessee, a railroad company must, ordinarily, depend upon an action at law, but, when this remedy is inadequate, resort may be had to equity. Thus, where an attack was threatened upon the validity of a lease, under which a railroad company held a road forming a necessary part of its system, it was held that the company might maintain a bill in equity against the lessor corporation and its officers to establish the validity of the lease.¹

II. *Liabilities of Lessee Corporation.*

§ 229. **Obligation of Lessee to perform Lessor's Public Duties.**—A lessee railroad company taking, by lease, the railroad, franchises and privileges of a lessor corporation, assumes its correlative duties and obligations. The burdens are inseparable from the privileges.² The lessee assumes the obligations connected with the operation of the railroad contained in the lessor's charter and must conform to its requirements.³ It must fulfil the conditions upon which the franchise was originally granted.⁴

A lessee corporation must, primarily, keep the road in operation.⁵ Where the lessor, in consideration of a grant of

¹ *Southern R. Co. v. North Carolina R. Co.*, 81 Fed. 595 (1897).

A lessee may intervene, as a party defendant, in an action by the attorney-general to forfeit the charter of the lessor corporation, especially where, the interests of the lessor being protected by stipulations, there is reason to believe it is not unfriendly to the proceeding.

People v. Albany, etc. R. Co., 77 N. Y. 232 (1879).

² *Mayor, etc. v. Twenty-Third St. R. Co.*, 113 N. Y. 311 (1889), (21 N. E. Rep. 60); *Chicago v. Evans*, 24 Ill. 52 (1860).

³ *People v. St. Louis, etc. R. Co.*, 176 Ill. 512 (1898), (52 N. E. Rep. 292).

⁴ *Mullen v. Philadelphia Traction Co.*, 4 Pa. Co. Ct. Rep. 164 (1887).

⁵ The law is clearly established that a railroad company may be compelled, by mandamus, to operate its railroad, and the underlying principles would seem to require the application of the same remedy where a lessee, after acquiring, under an authorized lease, a railroad and its franchises, fails to operate it. It has, however, been held that the lessee of a railroad under an *unauthorized* lease cannot be compelled by mandamus to operate it. See *People v. Colorado, etc. R. Co.*, 42 Fed. 638 (1890).

State or municipal aid, has entered into an agreement to maintain the road in a certain location, the lessee must fulfil the obligation.¹ So, where the charter of the lessor provides for the payment of a certain percentage of the receipts to the State or to a city, the lessee is bound to make the payment.² Where a lessor corporation, under its charter, is not permitted to abridge its liability as a common carrier, the lessee operates the road subject to the same condition.³

§ 230. **Statutory Liability of Lessee.**—Statutes have been enacted expressly providing that all duties imposed by law upon railroad companies shall be discharged by lessee corporations, and that all liabilities may be enforced against them.⁴

¹ *Chicago, etc. R. Co. v. Crane*, 113 U. S. 424 (1885), (5 Sup. Ct. Rep. 578).

See also *State v. Central Iowa R. Co.*, 71 Iowa, 410 (1887), (32 N. W. Rep. 409).

² Where the charter of a street railway company obliged it to pay one per cent of the fares received to the city in which it was located, and the company leased its railroad and franchises to another company, without any provision in the lease imposing upon the lessee the obligation to pay the percentage, it was held that the lessee, upon taking the place of its lessor as to its charter rights and powers, took its place also as to its charter obligations and duties, and was not entitled to exercise the former without discharging the latter. *Mayor, etc. v. Twenty-Third St. R. Co.*, 113 N. Y. 311 (1889), (21 N. E. Rep. 60).

³ *McMillan v. Michigan, etc. R. Co.*, 16 Mich. 102 (1867): "The power to lease does not imply the power to transfer greater rights than the lessor himself possesses; and where the obligations assumed by the lessor, pertaining to the management of his business, and the liabilities which would spring therefrom, were the consideration upon which the franchise was granted, it would be a violent inference that the legislature designed to waive them when they are no less important to the public protection after the lease than before."

⁴ *Iowa*: Code 1897, § 2039. Another provision of the Iowa Code (§ 2066) is as follows: "Any . . . corporation operating the railway of another shall be liable in the same manner and extent as though such railway belonged to it." For construction of this statute see *Stewart v. Chicago, etc. R. Co.*, 27 Iowa, 282 (1869); *Stephens v. Davenport, etc. R. Co.*, 36 Iowa, 327 (1873); *Bower v. Burlington, etc. R. Co.*, 42 Iowa, 546 (1876).

In *Indiana*, by statute, the lessee is solely liable when it operates the railroad in its own name. *Pittsburgh, etc. R. Co. v. Bolner*, 57 Ind. 572 (1877); *Pittsburgh, etc. R. Co. v. Hannon*, 60 Ind. 417 (1878); *Cincinnati, etc. R. Co. v. Bunnell*, 61 Ind. 183 (1878).

For additional statutory provisions prescribing the liability of lessees of railroad see:

Arizona: R. S. 1901, par. 864.

Arkansas: S. & H. Dig. 1894, §§ 6188, 6334.

Georgia: Code 1895, § 1863.

Massachusetts: Pub. St. ch. 112, § 5.

Nebraska: Comp. Stat. 1901, § 4020.

Ohio: Anno. Stat. (1787-1902), § 3305.

Tennessee: Code 1896, § 1539.

Texas: Sayles' Civ. Stat. 1897 (Supp. to 1900), vol. ii. ch. 15 a (Acts 1899, p. 73).

In *Georgia* (Code 1895, § 2335), a

Other statutes have been construed to apply to them as well as to lessor corporations.

As a general rule, statutes imposing duties upon railroad companies apply to the corporation actually operating the road. They are often applicable to the lessor corporation also — but the liability of the lessee is not thereby affected.

Statutes requiring railroad companies to fence their roads, and to maintain cattle guards at crossings, apply to lessee corporations, and they are held responsible for any failure to observe their provisions.¹

Statutes fixing the liability of railroad corporations for damages by fire communicated by their locomotives also apply to lessee corporations.² In construing such a Massa-

lessee of any railroad may be sued in the same jurisdiction in which the lessor might have been sued.

¹ I. *Failure to maintain fences:*

Ditchett v. Spuyten Duyvil, etc. R. Co., 67 N. Y. 425 (1876); *Tracy v. Troy, etc. R. Co.*, 38 N. Y. 433 (1868); *Birchfield v. Northern Central R. Co.*, 57 Barb. (N. Y.) 589 (1870); *Clement v. Canfield*, 28 Vt. 302 (1856); *Cook v. Milwaukee, etc. R. Co.*, 36 Wis. 45 (1874); *Clary v. Iowa Midland R. Co.*, 37 Iowa, 344 (1873); *Downing v. Chicago, etc. R. Co.*, 43 Iowa, 96 (1876). The liability of a lessee is sometimes placed upon grounds of public policy. Thus, in *Illinois Cent. R. Co. v. Kanouse*, 39 Ill. 272 (1866), the Court said, in substance, that the defendant was liable for using a defective road; that public policy required that it should be held responsible for injuries resulting from such use; that the fencing law was enacted for the public good and would be defeated if an irresponsible owner could lease an unfenced road to a responsible company which would not be liable for injuries; that the company using the road was *pro hac vice* the owner. See also *Toledo, etc. R. Co. v. Rumbold*, 40 Ill. (1866).

In *New York*, since 1890 (General Railroad Law, 1890 and 1892, § 32), both lessor and lessee are liable for

want of fences. Prior to that statute the lessee was alone held liable. *Thorne v. Lehigh Valley R. Co.*, 88 Hun (N. Y.), 141 (1895), (34 N. Y. Supp. 525). See also *ante*, § 216: "*Lessor Corporation cannot avoid Statutory Obligations unless exempted.*"

The *Iowa* statute (Code 1897, § 2058) is as follows: "If the . . . lessee owning or engaged in the operation of any railroad in the State refuses or neglects to comply with any provision of this chapter relating to fencing of the tracks, it shall be guilty of a misdemeanor."

II. *Failure to maintain Cattle Guards:*

In *Missouri Pacific R. Co. v. Morrow*, 32 Kan. 217 (1884), (4 Pac. Rep. 87, 19 Am. & Eng. R. Cas. 630), it was held, under a *Kansas* statute, that it is always the duty of a railway company operating a railroad to see that proper cattle guards exist wherever its railroad enters or leaves improved or fenced lands, whether such railway company owns the railroad or is simply operating it under a lease.

An *Iowa* statute (Code 1897, § 2054) relates to cattle guards and holds all railroad companies (including lessees) liable for all damages occasioned by a failure to maintain them.

² *Pierce v. Concord R. Corp.*, 51 N. H. 590 (1872); *Davis v. Providence, etc.*

chusetts statute, Judge Ames, in *Davis v. Providence, etc. R. Co.*,¹ after reviewing cases holding the lessor responsible, said : “ But there is nothing in these decisions, or in the reasons upon which they appear to rest, that confines the liability in such a case exclusively to the lessor, or that excludes the idea that the party injured may seek his remedy either of the lessor or the lessee. The case of the defendant comes literally within the terms of the statute. The fire was communicated from its engine. The damage was occasioned by its use of the road. . . . All the reasons, assigned in the above cited cases, for holding the corporation owning the road liable, apply with at least equal force to the corporation using the road and actually doing the mischief. Under such circumstances, the route, for the time being, may be considered as the route of the defendant; and there is no reason why it should not be held responsible for the damage caused by its use of the road, although the law has given to the injured party the right, if he sees fit, to seek his remedy against the corporation owning the road.”

A lessee corporation, holding under a long term lease, has been held to be the “ proprietor ” of the railroad, within the meaning of a New Hampshire statute relating to fires, and to be liable for damages sustained ;² and has been held to be the corporation “ owning the tracks,” within the provisions of a statute imposing upon railroads whose tracks crossed at grade, the joint duty of making repairs and of maintaining a lookout at the crossing.³

A lessee corporation is also liable for injuries to travellers at highway crossings, caused by a failure to equip its engines with statutory signals to warn them, and must observe other statutory provisions for the protection of the lives and property of the public.⁴

R. Co., 121 Mass. 134 (1876) ; *Cantlon v. Eastern R. Co.*, 45 Minn. 481 (1891), (48 N. W. Rep. 22). See also *Slossen v. Burlington, etc. R. Co.*, 60 Iowa, 215 (1882), (14 N. W. Rep. 244).

¹ *Davis v. Providence, etc. R. Co.*, 121 Mass. 134 (1876).

² *Pierce v. Concord R. Corp.*, 51 N. H. 590 (1872).

³ *Baltimore, etc. R. Co. v. Worker*, 45 Ohio St. 577 (1888), (14 West. Rep. 172, 16 N. E. Rep. 475).

⁴ A Massachusetts statute which required every railroad corporation to

§ 231. **Liability of Lessee for Torts in Operation of Road under Authorized or Unauthorized Lease.** — A railroad company operating, under lease, the railroad of another corporation, is liable for injuries caused by its negligent or improper operation, to the same extent that the lessor would have been had it continued to operate the road;¹ and its liability is not affected by the fact that the lease may have been unauthorized and the lessor also responsible for the same acts or omissions.²

The lessee is liable for its own wrongs regardless of the liability of others, and its responsibility is usually placed upon this ground.³ It may also be placed upon the ground that, in assuming the rights and franchises of the lessor to operate the road, the lessee assumes the correlative duty of operating it properly and the consequent liability for negligent operation.⁴

carry a bell on every engine passing upon "their road," etc., applied to a railroad corporation which had taken a lease of a railroad owned by another corporation and was running its own engines upon it under such lease. *Linfeld v. Old Colony R. Corp.*, 10 Cush. (Mass.) 562 (1852).

For construction of a Massachusetts statute (Pub. St. ch. 112, § 5), providing that a corporation lawfully maintaining and operating a railroad laid out and constructed by another corporation should be subject to the same duties and liabilities as if laid and constructed by itself, see *Nichols v. Boston, etc. R. Co.*, 174 Mass. 379 (1899), (54 N. E. Rep. 881).

¹ In *Sprague v. Smith*, 29 Vt. 425 (1857), (70 Am. Dec. 426), Chief Justice Redfield said: "It is well settled in practice, and by repeated decisions, that the lessees of railroads are liable to the same extent as the lessors would have been, while they continue to operate the road. . . . The party having independent control is, in general, liable for the acts of those under such control, whether in contract or tort."

² *Feital v. Middlesex R. Co.*, 109 Mass. 405 (1872) (*per* Colt, J.): "The defendants were in actual possession and use of the track without objection from the owners or the Commonwealth;

they assumed this responsibility to the plaintiff for a valuable consideration; and it is wholly immaterial, so far as this action is concerned, that the lease was not legally made."

In *McCluer v. Manchester, etc. R. Co.*, 13 Gray (Mass.), 124 (1859), it was held that a railroad company could not avoid liability for goods injured upon a railroad leased by it on the ground that the lease was void. The Court said (p. 129): "An innkeeper might as well resist the claim of a guest for compensation for the loss of his baggage, by suggesting doubts as to the validity of his landlord's title to the inn which he hired."

A lessee cannot be held liable for the torts of the lessor committed before the execution of the lease. *Pittsburgh, etc. R. Co. v. Kain*, 35 Ind. 291 (1871).

³ *Wabash, etc. R. Co. v. Peyton*, 106 Ill. 534 (1883); *Hall v. Brown*, 54 N. H. 495 (1874); *Toledo, etc. R. Co. v. Rumbold*, 40 Ill. 148 (1866); *Philadelphia, etc. R. Co. v. Anderson*, 94 Pa. St. 351 (1880), (6 Am. & Eng. R. Cas. 407); *St. Louis, etc. R. Co. v. Curl*, 28 Kan. 622 (1882), (11 Am. & Eng. R. Cas. 458).

⁴ *Sprague v. Smith*, 29 Vt. 421 (1857), (70 Am. Dec. 424); *McMillan v. Michigan, etc. R. Co.*, 16 Mich. 79

The obligation of a common carrier may be contractual, and a lessee corporation will be responsible for any damage arising from its breach of contract of carriage.¹ So, of course, the relations of the lessee corporation with its employees are contractual, and it is liable to them for any failure in the fulfilment of its obligations as master.² The lessee corporation is also liable for creating a nuisance, as well as for maintaining and continuing a nuisance created by the lessor.³

§ 232. **Joint Liability of Lessor and Lessee.** — As a general rule, in cases where, upon principles already considered, the lessor corporation is responsible for the negligence of the lessee, both corporations may be jointly sued and a joint judgment obtained.⁴ A joint liability is also sometimes created by statute.⁵

(1867); *Haff v. Minneapolis, etc. R. Co.*, 14 Fed. 558 (1882).

¹ *Wabash, etc. R. Co. v. Peyton*, 106 Ill. 534 (1883), (18 Am. & Eng. R. Cas. 1); *Arrowsmith v. Nashville, etc. R. Co.*, 57 Fed. 165 (1893); *Philadelphia, etc. R. Co. v. Anderson*, 94 Pa. St. 351 (1880), (6 Am. & Eng. R. Cas. 407).

In *Mahoney v. Atlantic, etc. R. Co.*, 63 Me. 68 (1873), and *Murch v. Concord R. Corp.*, 29 N. H. 1 (1854), (61 Am. Dec. 631), it was held that the remedy of a passenger injured is against the company with which he contracts.

² The lessee of a continuous line of railroad is liable to suit by an employee for an injury received anywhere on the line, which may be brought at the general residence of the lessee corporation whether within or without the limits of the State where the injury occurred. *Watson v. Richmond, etc. R. Co.*, 91 Ga. 222 (1892), (18 S. E. Rep. 306).

³ *Ante*, § 217: "Lessor cannot avoid Primary Obligations unless exempted."

In *Wasmer v. Delaware, etc. R. Co.*, 80 N. Y. 216 (1880), (1 Am. & Eng. R. Cas. 125), where a railroad was improperly laid upon and along a street, the Court said: "The defendant cannot escape liability for this condition of the railroad, because it was simply the lessee of the road. It had the possession, the use and control of the road, and could not keep and maintain the rails in such a way in the street as to be dangerous to travellers thereon, and yet escape responsibility. He who knowingly maintains a nuisance is just as responsible as he who created it."

See also *Dickson v. Chicago, etc. R. Co.*, 71 Mo. 575 (1880); *Western, etc. R. Co. v. Cox*, 93 Ga. 561 (1894), (20 S. E. Rep. 68).

Compare, however, *Kearney v. New Jersey Central R. Co.*, 167 Pa. St. 362 (1895), (31 Atl. Rep. 637), where a lessee was held not liable for an overflow caused by an improperly constructed bridge.

⁴ *Pennsylvania Co. v. Ellet*, 132 Ill.

⁵ In *Ohio* (Anno. Stat. 1787-1902, § 3305), it is provided that lessor and lessee may be jointly sued for negligence. This statute is construed in *Staltz v. Baltimore, etc. R. Co.*, 7 Ohio

N. P. 129 (1897). For construction of an *Iowa* statute, see *Stephen v. Davenport, etc. R. Co.*, 36 Iowa, 327 (1873); *Clary v. Iowa Midland R. Co.*, 37 Iowa, 344 (1873).

The lessor and lessee corporations may be jointly liable for a nuisance—the former for creating, the latter for continuing it.¹ A separate liability, as has been shown, also exists.² So, where both lessor and lessee participate in the management of a railroad, they are jointly and severally liable for injuries caused by the negligence of employees, for the employees are as much the servants of the one as of the other.³ And where a railroad is operated under an unauthorized lease, the lessee becomes the agent of the lessor in such operation, and the general principle is applicable that the liability for negligence of principal and agent may be enforced in a suit against either or both.⁴ The lessor and lessee may also, in such a case, be held jointly liable, upon the ground that they are undertaking an unlawful enterprise and are wrongfully usurping powers.

This general rule also, undoubtedly, applies in the case of an authorized lease, without an exemption clause, in those States where an express grant of immunity is necessary to

654 (1890), (24 N. E. Rep. 559). In this case the plaintiff recovered a joint judgment against both defendants—lessor and lessee. Compare, however, *Spangler v. Atchison, etc. R. Co.*, 42 Fed. 307 (1890), where the Court said: "It may also be conceded that both are liable. But the action is joint as well as several. The plaintiff had the right to proceed against either one of them, and would be entitled in the joint action to take judgment against one, and *dismiss* as to the other." See also *Logan v. North Carolina R. Co.*, 116 N. C. 940 (1895), (21 S. E. Rep. 959).

¹ *Stickley v. Chesapeake, etc. R. Co.*, 93 Ky. 323 (1892), (20 S. W. Rep. 261). In *Railroad Co. v. Hambleton*, 40 Ohio St. 503 (1884), (14 Am. & Eng. R. Cas. 126), the Supreme Court of Ohio said: "Numerous cases are referred to by counsel for the plaintiff in error involving the liability of lessor and lessee. But most of them are cases involving the separate liability of lessor and lessee. This case involves the joint liability of lessor and lessee, and this class of liability is clearly applicable to a person

who creates a nuisance jointly with him who continues it."

² *Ante*, § 217: "*Lessor cannot avoid Primary Obligations unless exempted.*"

³ In *Nashville, etc. R. Co. v. Carroll*, 6 Heisk. (Tenn.) 357 (1871), the Court said: "The principle is, that where one has the exclusive control and management of the train, whether owner or not of the cars, it is responsible for damages for wrongs; and if this be so, it follows, necessarily, that if, in fact, that control be joint, and the train jointly under the control of agents of the two companies, then both must be held responsible. Two persons may be joint masters, and thereby subject to a joint liability for the acts of servants or employees; and such joint liability may be converted into a several liability by the election of the plaintiff to sue only one, which may be done in such a case."

See also *Railroad Co. v. Brown*, 17 Wall. (U. S.) 445 (1873). Also *ante*, § 221: "*Liability of Lessor for Negligent Operation of Railroad — (D) When it shares in Control.*"

⁴ *Cooley on Torts*, p. 165.

relieve a lessor from liability for the negligence of its lessee. It should be observed, however, that this application of the rule renders a railroad company which makes a lease, with the approval of the State, a joint *tort feasor* in the operation of a road over which it has no control.¹

§ 233. **Liability of Lessee for Debts of Lessor.** — A railroad company taking, under lease, in good faith, the railroad and franchises of another corporation, assumes, as a general rule, no responsibility for the unsecured debts of the latter. Where, however, the lease embraces the entire property of a lessor corporation in debt, of the existence of which indebtedness the lessee has notice, it may, upon the principle that the property of a corporation constitutes a trust fund for the payment of its debts, be chargeable as a trustee and compelled to apply the property so received, in payment of the debts of the lessor.² And even without bad faith on the part of the lessor or lessee, where the entire property of a corporation having debts is transferred, under a lease permitting the lessee to dispose of a portion of the leased property and apply the proceeds, not only for the improvement of the remaining property but for its own benefit — thus preventing any application for the satisfaction of debts — and the lessee makes such sale and application, a court of equity will decree the payment of a judgment debt of the lessor by the lessee.³

¹ Even if the lessor and lessee under an authorized lease are joint *tort feasors* it is certain that the rule which forbids contribution among wrong-doers is inapplicable in favor of a lessee.

² *Mellen v. Moline Iron Works*, 131 U. S. 352 (1889), (9 Sup. Ct. Rep. 781); *Central R. Co. v. Pettus*, 113 U. S. 116 (1885), (5 Sup. Ct. Rep. 387).

³ In *Chicago, etc. R. Co. v. Third National Bank*, 134 U. S. 276 (1890), (10 Sup. Ct. Rep. 550), *affirming* 26 Fed. 820 (1886), where a railroad company, heavily in debt, leased all its property to another company for nine hundred and ninety-nine years; and also executed a deed of trust securing bonds to a large amount which were to be sold for the payment of existing liens and for the

benefit of the lessee, and the bonds were so sold and applied, among other things, for the building of a bridge for the lessee's benefit, the Supreme Court of the United States said (p. 286): "The contracting parties arranged not merely for the discharge of the foreclosure lien, but for the completion of the road for which the lessor's franchise was granted. The lessee not only performed these stipulations, but, with moneys arising from the sale of these bonds, built, for its own benefit, a bridge across the Mississippi River, connecting this road with its line in Iowa, and thus making a continuous line of road to Omaha. Neglecting to pay the debts of the lessor, it appropriated a large amount of the proceeds

In such a case the lessee corporation is liable, not as lessee, but as a trustee which has diverted funds due creditors to its own use.

A lessee corporation may, as a part of the consideration of the lease, assume and agree to pay the debts of the lessor. In such a case, the weight of authority supports the view that the lessee may be held directly liable to creditors of the lessor upon the assumption clause.¹

CHAPTER XXI.

RAILROAD LEASES UNDER RECEIVERSHIP.

§ 234. Receiver not Assignee of the Term. May not abrogate Leases as between Parties.

§ 235. Receiver may elect within Reasonable Time to assume or renounce Lease.

§ 236. Obligations of Receiver pending Election.

§ 237. Obligations of Receiver after Election.

§ 238. Lease of Railroad by Receiver.

§ 234. Receiver not Assignee of the Term. May not abrogate Leases as between Parties. — The appointment of a receiver of the property of a railroad company, by a court of equity,² does not change the title to the property or even the

of the trust deed upon the lessor's property to its own benefit, and the improvement of its own property. Here clearly was a diversion of funds, which the creditors of the lessor might follow in equity. This is only the application of familiar doctrine. The properties of a corporation constitute a trust fund for the payment of its debts; and, when there is a misappropriation of the funds of a corporation, equity, on behalf of the creditors of such corporation, will follow the funds so diverted."

¹ See *ante*, § 123: "*Liability of Purchasing Corporation for Debts of Vendor Company.*"

For cases illustrating assumption of debts of lessor by lessee corporation, see *Mississippi, etc. R. Co. v. Southern R. Ass'n*, 7 Baxt. (Tenn.) 595 (1874),

(11 Am. & Eng. R. Cas. 576); *Pennsylvania Co. v. Erie, etc. R. Co.*, 108 Pa. St. 621 (1885), (29 Am. & Eng. R. Cas. 549).

² In some of the States, as in New York, a certain class of receivers are, by statute, invested with the estate of an insolvent with, substantially, the powers of trustees in bankruptcy. Such statutes are, however, generally inapplicable to railroad companies, and the receivers referred to in this chapter are those appointed according to the course of equity. See *Quincy, etc. R. Co. v. Humphreys*, 145 U. S. 82 (1892), (12 Sup. Ct. Rep. 787), and *Gaither v. Stockbridge*, 67 Md. 222 (1887), (9 Atl. Rep. 632). Also *Booth v. Clark*, 17 How. (U. S.) 322 (1854).

right of possession. The receiver takes the property, including leasehold interests, merely as a custodian for the court from which he derives his authority; he does not become an assignee of the unexpired term of the leasehold estate.¹ As said by the Supreme Court of Maryland,² in language approved by the Supreme Court of the United States:³ "If the order of the court, under which the receiver acts, embraces the leasehold estate, it becomes his duty, of course, to take possession of it. But he does not, by taking such possession, become the assignee of the term, in any proper sense of the word. He holds that as he would hold any other personal property involved, — for and as the hand of the court, and not as assignee of the term."

The intervention of a court of equity for the preservation of property involved in litigation by putting it into the hands of a receiver — a ministerial officer — not only makes no change in the title but alters no lien or contract. A contract of lease is not affected by the appointment of a receiver, nor is the right of the lessor corporation to insist upon performance or forfeiture in any way impaired. The lease remains in full force until terminated by the parties, and the receiver

¹ Quincy, etc. R. Co. v. Humphreys, 145 U. S. 82 (1892), (12 Sup. Ct. Rep. 787), *affirming sub nom.* Central Trust Co. v. Wabash, etc. R. Co., 34 Fed. 259 (1888); Union Bank of Chicago v. Kansas City Bank, 136 U. S. 223 (1890), (10 Sup. Ct. Rep. 1013); Central Trust Co. v. Continental Trust Co., 86 Fed. 517 (1898); Empire Distilling Co. v. McNulta, 77 Fed. 700 (1897), *affirmed sub nom.* Dennehy v. McNulta, 86 Fed. 825 (1898), (41 L. R. A. 609); Carswell v. Farmers Loan, etc. Co., 74 Fed. 88 (1896); Ames v. Union Pacific R. Co., 60 Fed. 966 (1894); New York, etc. R. Co. v. New York, etc. R. Co., 58 Fed. 268, 280 (1893); Park v. New York, etc. R. Co., 57 Fed. 799 (1893); Bell v. American Protective League, 163 Mass. 558 (1895), (40 N. E. Rep. 857); Gaither v. Stockbridge, 67 Md. 222 (1887), (9 Atl. Rep. 632). *Compare*, however, United States Trust Co. v.

Wabash Western R. Co., 150 U. S. 287 (1893), (14 Sup. Ct. Rep. 86), where Mr. Justice Brown apparently overlooks the language of Mr. Chief Justice Fuller in Quincy, etc. R. Co. v. Humphreys, *supra*, and considers a receiver as standing in the same position as an assignee. In Brown v. Toledo, etc. R. Co., 35 Fed. 444 (1888), Judge Graham, in view of the nature of the proceedings, treated the receiver as an assignee of the term, but that decision has been criticised in later cases. New York, etc. R. Co. v. New York, etc. R. Co., 58 Fed. 268 (1893). *Compare also* Commonwealth v. Frankfort Ins. Co., 115 Mass. 278 (1874).

² Gaither v. Stockbridge, 67 Md. 224 (1887), (9 Atl. Rep. 632).

³ Quincy, etc. R. Co. v. Humphreys, 145 U. S. 98 (1892), (12 Sup. Ct. Rep. 787).

has no power to abrogate it as between them. "It is not in the power of such receivers to annul or abrogate such a lease as between the lessor and lessee company."¹

§ 235. **Receiver may elect within Reasonable Time to assume or renounce Lease.** — When a receiver of a railroad company, having leased lines, is appointed, it is necessary, in order to keep the entire system a going concern, that he should take possession of and operate the leased roads, as well as the other roads of the system. The public duties of the corporations — lessor and lessee — must be performed; their obligations, to the government in carrying the mails, to the public as common carriers, must be fulfilled without interruption, and this result can only be obtained by putting the receiver into temporary possession of the leasehold interests. The mere act of taking possession, however, does not constitute an adoption of the lease by the receiver nor render him liable upon its covenants, and he is entitled to a reasonable time — a breathing spell — to determine whether he will assume or renounce the lease.²

¹ New York, etc. R. Co. v. New York, etc. R. Co., 58 Fed. 280 (1893), *per* Lurton, J. In Park v. New York, etc. R. Co., 57 Fed. 802 (1893), Judge Lacombe said: "The right to insist upon the execution of this contract according to its terms — the right to refuse further use and possession of that property to any one who will not or cannot make such payments — is in no way impaired by the fact that the court has taken possession of all the property owned and held by the Erie Company, to administer the same for the interests of all concerned, and has placed its officers, the receivers, as custodians and caretakers, not only to preserve the same, but also to maintain it as a going concern pending the final adjustment."

A receiver cannot, by agreement with the lessor company, abrogate a lease, pending receivership, without the consent of the court. In determining the matter, the court will take into consideration the situation of the parties at the time the receiver was appointed.

Day v. Postal Tel. Co., 66 Md. 354 (1886), (7 Atl. Rep. 608).

² A receiver, appointed by order of a court of equity, is obliged to take possession of a leasehold estate, if it be included within the order of the court; but he does not, thereby, become the assignee of the term or liable for the rent, but holds the property as the hand of the court and is entitled to a reasonable time to ascertain its value, before he can be held to have accepted it as lessee. Quincy, etc. R. Co. v. Humphreys, 145 U. S. 82 (1892), (12 Sup. Ct. Rep. 787). In so holding Mr. Chief Justice Fuller said (p. 101): "The court did not bind itself or its receivers *eo instanti* by the mere act of taking possession. Reasonable time had necessarily to be taken to ascertain the situation of affairs. The Quincy Company, as a *quasi*-public corporation operating a public highway, was under a public duty to keep up and maintain its railroad as a going concern, as was the Wabash Company under the con-

As said by Judge Lurton in the recent case of *Carswell v. Farmers Loan, etc. Co.*:¹ "A receiver may take and retain possession of leasehold interests for such reasonable time as will enable him to intelligently elect whether the interest of his trust will be best subserved by adopting the lease, and making it his own, or by returning the property to the lessor."

What constitutes a reasonable time, within which a receiver must elect, depends to such an extent upon the facts and circumstances appearing in any particular case, that no general rule can be laid down for determining it.²

tract between them, but the latter had become unable to perform the public service for which it had been endowed with its faculties and franchises, and which it had assumed to discharge as between it and the other company. Its operation could only be continued under the receivers, whose action in that respect cannot be adjudged to have been dictated by the idea of keeping the property in order to sell it, or using it to the advantage of the creditors, or doing otherwise than 'abstain from trying to get rid of the property.'"

See also *United States Trust Co. v. Wabash Western R. Co.*, 150 U. S. 287 (1893), (14 Sup. Ct. Rep. 86); *Seney v. Wabash Western R. Co.*, 150 U. S. 310 (1893), (14 Sup. Ct. Rep. 94); *St. Joseph, etc. R. Co. v. Humphreys*, 145 U. S. 105 (1892), (12 Sup. Ct. Rep. 795); *Sunflower Oil Co. v. Wilson*, 142 U. S. 313 (1892), (12 Sup. Ct. Rep. 235); *Central Trust Co. v. Continental Trust Co.*, 86 Fed. 517 (1898); *Mercantile Trust Co. v. Farmers Loan, etc. Co.*, 81 Fed. 254 (1897); *Empire Distilling Co. v. McNulta*, 77 Fed. 700 (1897); *Carswell v. Farmers Loan, etc. Co.*, 74 Fed. 88 (1896); *Ames v. Union Pacific R. Co.*, 60 Fed. 966 (1894); *Farmers Loan, etc. Co. v. Northern Pacific R. Co.*, 58 Fed. 257 (1893); *New York, etc. R. Co. v. New York, etc. R. Co.*, 58 Fed. 268 (1893); *Park v. New York, etc. R. Co.*, 57 Fed. 799 (1893); *Bell v. American Protective League*, 163 Mass. 558 (1895), (40 N. E. Rep. 857).

An agreement that the receipt of less than full rental for leased property shall be without prejudice to a claim for the balance, or to the lessor's right to forfeit the lease, makes the receiver hold under the agreement, and not under the lease, so that his continued possession does not amount to an adoption of the lease. *Thomas v. Cincinnati, etc. R. Co.*, 77 Fed. 667 (1896).

¹ *Carswell v. Farmers Loan, etc. Co.*, 74 Fed. 91 (1896).

² Receivers of a lessee railroad company are not bound, merely by their appointment, to assume all its leases; but they have a reasonable time in which to determine whether they will assume or renounce them. And where numerous contracts are to be examined, a delay of 65 days before renouncing a lease is not unreasonable. *Ames v. Union Pacific R. Co.*, 60 Fed. 966 (1894).

In *Quincy, etc. R. Co. v. Humphreys*, 145 U. S. 82 (1892), (12 Sup. Ct. Rep. 787), one month was said to be a reasonable time in which to make an election to accept or surrender a lease. In *St. Joseph, etc. R. Co. v. Humphreys*, 145 U. S. 105 (1892), (12 Sup. Ct. Rep. 787), under somewhat extraordinary circumstances, a period of nine months was held not to be an unreasonable time. In *Park v. New York, etc. R. Co.*, 57 Fed. 799 (1893), two weeks was said not to be unreasonable. A period of ten months, during all of which time negotiations were being carried on for a reduction of the rental, was held in

It is not necessary in order to charge the receiver that he should have formally elected to assume the lease. His possession of the leased property might be continued for such a period and under such circumstances as would, in law, be equivalent to an election.¹ Thus, receivers of a leased railroad, who for a long time continued to operate the leased line, and issued receivers' certificates to raise money for paying taxes thereon according to the provisions of the lease, were held to have adopted the lease, and to be liable to repay to the lessor taxes on the leased line which it had been compelled to pay by the judgment of a competent court.² Where the question of the renunciation or adoption of a lease has been, by a receiver, submitted to and determined, after due consideration, by the court appointing him, its decision, being upon a question of business policy and not of law, and administrative rather than judicial in its nature, will not be disturbed by an appellate court, unless it appears that the discretion of the lower court has been abused.³

If the receiver elect to adopt a lease, he becomes vested with the title to the leasehold interest, and a privity of estate is thereby created between the lessor and the receiver by which the latter becomes liable upon the covenant to pay rent.⁴

§ 236. **Obligations of Receiver pending Election.** — As already shown, the appointment of a receiver of a lessee corporation does not work an assignment of the lease or render him liable upon the covenants therein. While the receiver may operate the leased railroad for a reasonable time in order to determine whether he will adopt the lease, he does not, as a

Carswell v. Farmers Loan, etc. Co., 74 Fed. 88 (1896), to be a reasonable time. action and not by mere petition in the receivership cause.

¹ *Empire Distilling Co. v. McNulta*, 77 Fed. 700 (1897), and cases cited.

People v. Erie R. Co., 54 How. Pr. 59 (1877). See also *Woodruff v. Erie R. Co.*, 93 N. Y. 609 (1883).

² *United States Trust Co. v. Mercantile Trust Co.*, 88 Fed. 140 (1898).

A receiver will not be ordered to assume a lease merely because the company he represents is solvent. *Empire Distilling Co. v. McNulta*, 77 Fed. 700 (1897).

³ *Mercantile Trust Co. v. Farmers Loan, etc. Co.*, 81 Fed. 254 (1897).

Disputed questions of fact as to whether a receiver has renounced or assumed a lease must be determined by

⁴ *Mercantile Trust Co. v. Farmers Loan, etc. Co.*, 81 Fed. 254 (1897).

general rule, thereby become liable for the stipulated rent for such period, in case he finds the road unprofitable, and, with the approval of the court, surrenders it to its owner.¹ He

¹ In *Quincy, etc. R. Co. v. Humphreys*, 145 U. S. 98 (1892), (12 Sup. Ct. Rep. 787), Mr. Chief Justice Fuller said: "But appellants insist that, without regard to privity of estate or privity of contract, receivers in chancery are liable, not for a reasonable rental value during the occupancy of leased property committed to their charge by order of court, but for rental according to the covenants of the leases whenever there are unequivocal acts of use and control of such property; and that they thus adopt the leases and become bound by their terms so long as such use and control continue. . . . Clearly, this was no case of the employment of the property of another for one's own benefit. Within a month, the receivers applied to the court for instructions, distinctly setting forth that there was no income wherewith to pay the rental in question, and the order of court, entered at once, proceeded under the theory that they were not to be bound by the rental prescribed. . . . We do not discover any equitable ground upon which appellants are entitled to a preference in the distribution of the proceeds of the sale of the mortgaged property. The cost of the maintenance of the Quincy road by the receivers exceeded its total earnings; and the net earnings of the whole Wabash system, before the Quincy Company retook its road, did not amount to one quarter of the amount of preferred debt existing when the receivers were appointed. The property was surrendered to it freed from any charge for that debt, to the payment of which it contributed nothing."

An order directing receivers to keep divisional accounts, and to pay rental on leased lines only to the extent of any surplus earned by them, is notice to such lines that they must not expect payment of rentals unless there is a surplus; and if they do not then intervene

to regain possession of the property, they have no claim on the receivers in the event that there is no surplus. *United States Trust Co. v. Wabash Western R. Co.*, 150 U. S. 287 (1893), (14 Sup. Ct. Rep. 86); *Seney v. Wabash Western R. Co.*, 150 U. S. 310 (1893), (14 Sup. Ct. Rep. 94).

Receivers have, as a general rule, a reasonable time in which to determine whether they will adopt the lease, or will merely pay to the lessor the net earnings of its road, subject, always, to the lessor's right to re-enter for condition broken. *Farmers Loan, etc. Co. v. Northern Pacific R. Co.*, 58 Fed. 257 (1893).

The expenses and deficits incurred by receivers in operating a railroad under a lease which it was their duty to renounce are chargeable to the leased road, and not to the receivers, where they have not assumed the lease. *Mercantile Trust Co. v. Farmers Loan, etc. Co.*, 81 Fed. 254 (1897).

A lessor corporation has no preferred claim for rentals accruing during receivership where it did not demand either possession, or confirmation of lease by receiver. *New York etc. R. Co. v. New York, etc. R. Co.*, 58 Fed. 268 (1893).

See also as sustaining general principle stated in text: *St. Joseph, etc. R. Co. v. Humphreys*, 145 U. S. 105 (1892), (12 Sup. Ct. Rep. 987); *Milwaukee, etc. R. Co. v. Brooks, etc. Works*, 121 U. S. 430 (1887), (7 Sup. Ct. Rep. 1094); *Park v. New York, etc. R. Co.*, 57 Fed. 799 (1893); *Ames v. Union Pacific R. Co.*, 60 Fed. 966 (1894); *Bell v. American Protective League*, 163 Mass. 558 (1895), (40 N. E. Rep. 857).

Contra, however, *Woodruff v. Erie R. Co.*, 93 N. Y. 609 (1883), where the New York Court of Appeals held that a receiver could not take possession of a leased railroad and enjoy its use and

must, however, deal fairly with the lessor and is bound to turn over the net earnings of the road, if less than the stipulated rent, to the lessor, and to pay a reasonable rental for leased property, in itself non-producing.¹ This is equitable. The receiver operates the leased road subject to the right of the lessor to re-enter for condition broken and to insist upon an immediate adoption of the lease or surrender of the road. If the lessor fail to assert his right, it may fairly be presumed that the trial of the road by the receiver is of as much importance to him as to the receiver, and there is no reason why the receiver should hazard the *corpus* of his estate by the experiment.

Where, however, the lessor, immediately upon the appointment of the receiver, demands of the receiver and of the court, either an assumption of the lease or a surrender of the road, and the decision is long delayed that the receiver may determine which policy is expedient, he must pay the stipulated rent for the time he has had possession, in case he elects to surrender the road.² So, where a receiver operates a leased

occupation, without incurring liability for the rent reserved.

See also *Mercantile, etc. Co. v. Southern, etc. R. Co.*, 113 Ala. 543 (1897), (21 So. Rep. 373); *Brown v. Toledo, etc. R. Co.*, 35 Fed. 444 (1888).

¹ See cases cited in preceding note. Also *Carswell v. Farmers Loan, etc. Co.*, 74 Fed. 88 (1896), where a receiver of a railroad retained possession of leased depot property for ten months, with the assent of the depot company negotiations being all the time in progress to fix a reasonable rent. At the end of this time, a receiver of the depot company was appointed. It was held that the railway receiver had not elected to adopt the lease, and was liable only for a reasonable rent of the depot, not for the stipulated rental.

And see *Savannah, etc. R. Co. v. Jacksonville, etc. R. Co.*, 79 Fed. 35 (1897).

Where a mortgage trustee notified the lessor upon taking possession that he repudiated the lease but would

pay fair compensation the court upheld the notice. *Milwaukee, etc. R. Co. v. Brooks, etc. Works*, 121 U. S. 430 (1887), (7 Sup. Ct. Rep. 1094).

² In *Farmers Loan, etc. Co. v. Northern Pacific R. Co.*, 58 Fed. 265 (1893), Judge Jenkins said: "So that here the lessors have been continuously knocking at the door of the court, demanding possession of the demised premises, and possession has been withheld from them against their consent, and against their protest. It appears to the court that, under such circumstances, it would be inequitable to say that the court or its receivers should hold possession of the demised premises, refusing to pay rent accruing before the receivership, taking from the lessor their estate without their consent, express or implied, and saying to them: 'While we take and withhold that possession until it shall be satisfactorily determined whether it is profitable or not to operate the road, you, the lessee, shall not have your rental pending that determination ac-

road and keeps no separate accounts showing the net earnings of the road, he must pay the rent stipulated for the time of his possession, although he renounces the lease.¹ In such cases, equity establishes exceptions to the general rule.

§ 237. **Obligations of Receiver after Election.** — When, after due investigation, a receiver elects, and the court, after consideration, determines, to surrender a leasehold interest to its owner, and such surrender is made and compensation for the use, pending election, is paid, according to the principles just indicated, the connection of the receiver with the leased property terminates; but when the receiver, with the approval of the court, decides not to surrender the lease, and so notifies the lessor and continues in possession of the leased property, such acts constitute an adoption of the lease and carry with it an obligation to fulfil the covenants of the lease and to pay the rental stipulated.² Thus, where a receiver adopts a lease containing provisions for the purchase of the property leased, he is bound by the instrument.³

When a receiver is operating a railroad system consisting of many leased lines, the leases of which have been adopted, the accounts of each line should be kept separately, and the

according to the stipulations of the lease under which possession was taken.' "

¹ *Central, etc. Co. v. Farmers Loan, etc. Co.*, 79 Fed. 158 (1897).

Where a receiver operates leased lines for a year, and uses the earnings to pay interest, the court will order him, to that extent, to pay taxes on the road as required by the terms of the lease. *Clyde v. Richmond, etc. R. Co.*, 63 Fed. 21 (1894).

² *Central Trust Co. v. Continental Trust Co.*, 86 Fed. 517 (1898).

See also *Easton v. Houston, etc. R. Co.*, 38 Fed. 784 (1889); *Mercantile, etc. Co. v. Southern, etc. Co.*, 113 Ala. 543 (1897), (21 So. Rep. 373). *Spencer v. World's Columbian Exposition*, 163 Ill. 117 (1896), (45 N. E. Rep. 250).

Where a lessee corporation agreed to pay, as a part of the rental, the interest on certain bonds, the holders of such bonds, on the appointment of a

receiver by a federal court for such corporation, were permitted to come in and directly assert their claims for interest against the fund in the hands of the court for the payment of rentals, notwithstanding the appointment of a receiver for the lessor corporation, with power to collect the rentals. *Mercantile Trust Co. v. Baltimore, etc. R. Co.*, 94 Fed. 722 (1899).

See also *Grand Trunk R. Co. v. Central Vermont R. Co.*, 78 Fed. 690 (1897), *affirmed sub nom. Bank v. Smith*, 86 Fed. 398 (1898).

As to submission of amount of increased rental due to improvements to arbitration see *Farmers Loan, etc. Co. v. Chicago, etc. R. Co.*, 18 Fed. 484 (1883), *affirmed sub nom. Peoria, etc. R. Co. v. Chicago, etc. R. Co.*, 127 U. S. 200 (1888), (8 Sup. Ct. Rep. 1125).

³ *Mercantile Trust Co. v. Atlantic, etc. R. Co.*, 80 Fed. 18 (1897).

outlay of each reduced, if possible, until it pays operating expenses; but if the receiver is unable to do so, receiver's certificates on the whole system may be issued to make up the deficiency.¹ So, where a receiver has been unable to obtain money for the payment of rentals, the court, on final decree, may properly declare the unpaid rentals a first lien on the property and direct that the same, with interest, be paid out of the proceeds of the sale, as a preferential lien.²

When, however, the court, in authorizing a receiver to operate a leased line, provides that the rent shall be paid only after certain prior payments have been made, the lessor cannot claim payment from the receiver absolutely.³ The lessor may re-take its road if dissatisfied with the provisions of the order, but its only demand against the receiver is in accordance with the order.

Where a receiver makes a valid contract for repairs on leased rolling stock, he is liable thereon as receiver, although it is subsequently turned over to another receiver.⁴

§ 238. **Lease of Railroad by Receiver.** — As a railroad corporation cannot, itself, lease its railroad and franchises, without legislative authority, a receiver who temporarily assumes its functions does not, without like authority, possess the power.⁵ The necessary authority is legislative, not judicial, and, in order to justify a lease by receivers, some statutory provision must confer the right to execute it.

¹ *Central Trust Co. v. Wabash, etc. R. Co.*, 23 Fed. 863 (1885). See also *Miltenberger v. Logansport R. Co.*, 166 U. S. 286 (1882), (10 Sup. Ct. Rep. 140).

² *Central Trust Co. v. Continental Trust Co.*, 86 Fed. 517 (1898).

Where a railroad lease is declared void the lessor has no right to *quantum meruit* against funds in hands of receiver, the operation of the leased road having been a source of loss. *St. Louis, etc. R. Co. v. Cleveland, etc. R. Co.*, 125 U. S. 658 (1888), (8 Sup. Ct. Rep. 1011).

Whether a debt for rental of a leased line, part of a railroad system, shall be treated as an obligation of the receiver-

ship, see *Central R., etc. Co. v. Farmers Loan, etc. Co.*, 79 Fed. 158 (1897).

Lessor has no preferred claim for rentals during receivership where it did not demand either possession or confirmation of lease by receiver. *New York, etc. R. Co. v. New York, etc. R. Co.*, 58 Fed. 268 (1893).

³ *Central Trust Co. v. Wabash, etc. R. Co.*, 38 Fed. 63 (1889).

⁴ *Central Trust Co. v. Wabash, etc. R. Co.*, 50 Fed. 857 (1892).

⁵ *State v. McMinnville, etc. R. Co.*, 6 Lea (Tenn.), 369 (1880); *McMinnville etc. R. Co. v. Huggins*, 3 Baxt. (Tenn.) 177 (1873).

Courts have, however, sometimes authorized receivers appointed by them to *take* leases of railroads, — generally short connecting lines, — where the interest of the creditors and the corporation required it.¹ Upon the principle that legislative authority is as necessary to take as to make a lease, it is assumed that such orders have been passed only where some general or special law authorized the connection, by lease, of the road leased with that controlled by the receiver. It cannot be that a receiver, without an enabling statute in his behalf and without authority in the corporation he represents, can, by mere order of court, assume the discharge of public duties imposed on another corporation.

CHAPTER XXII.

ULTRA VIRES AND VOIDABLE RAILROAD LEASES.

- § 239. Distinction between *Ultra Vires* and Irregular Leases.
- § 240. Enforcement of Executory *Ultra Vires* Leases.
- § 241. Delivery of Possession under *Ultra Vires* Lease.
- § 242. Right and Duty of Disaffirmance.
- § 243. Recovery of Property after Disaffirmance.
- § 244. Recovery on *Quantum meruit* for Past Use.
- § 245. Improvements made by Lessee under *Ultra Vires* Lease.
- § 246. Effect of *Ultra Vires* Lease upon Stock Subscriptions.
- § 247. Guarantee of *Ultra Vires* Lease void.
- § 248. Voidable Railroad Leases.
- § 249. Leases of Railroads for Purpose of suppressing Competition.
- § 250. Remedy of State — *Quo Warranto*.
- § 251. Remedy of State — Injunction.

§ 239. Distinction between *Ultra Vires* and Irregular Leases. — There is an obvious distinction between a want of power and a want of formalities in the exercise of power. More precisely, the exercise by a corporation of a power not conferred by its charter or the laws of its incorporation, is

¹ *Gibert v. Washington City, etc. Mercantile Trust Co. v. Missouri, etc. R. Co.*, 33 Gratt. (Va.) 586 (1880); *R. Co.*, 41 Fed. 8 (1889).

clearly distinguishable from the irregular exercise, in a particular instance, of a general power conferred upon a corporation.¹

A lease of a railroad, without legislative authority, is wholly void, and the parties thereto are permitted to plead their want of authority, upon the ground that a court will not interfere in aid of parties to an illegal enterprise. Principles of estoppel and ratification are inapplicable. A corporation cannot ratify that which it was without power to do in the

¹ In *Central Transp. Co. v. Pullman Car Co.*, 139 U. S. 59 (1891), (11 Sup. Ct. Rep. 478), Mr. Justice Gray said: "A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it had complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws. The doctrine of the common law, by which a tenant of real estate is estopped to deny his landlord's title, has never been considered by this court as applicable to

leases by railroad corporations of their roads and franchises. It certainly has no bearing upon the question whether this defendant may set up that the lease, sued on, which is not of real estate, but of personal property, and which includes, as inseparable from the other property transferred, the inalienable franchise of the plaintiff, is unlawful and void, for want of legal capacity in the plaintiff to make it."

And in *Davis v. Old Colony R. Co.*, 131 Mass. 260 (1881), Mr. Justice Gray, then Chief Justice of the Supreme Judicial Court of Massachusetts, said: "There is a clear distinction, as was pointed out by Mr. Justice Campbell in *Zabriskie v. Cleveland, etc. R. Co.*, 23 How. (U. S.) 398 (1859), by Mr. Justice Hoar in *Monument Bank v. Globe Works*, 101 Mass. 58 (1869), and by Lord Chancellor Cairns and Lord Hatherly in *Ashbury Carriage, etc. Co. v. Riche*, L. R. 7 H. L. 684 (1875), between the exercise by a corporation of a power not conferred upon it, varying from the objects of its creation as declared in the law of its organization, of which all persons dealing with it are bound to take notice; and the abuse of a general power, or the failure to comply with prescribed formalities or regulations, in a particular instance, when such abuse or failure is not known to the other contracting party."

See also *Miners Ditch Co. v. Zellerbach*, 37 Cal. 543 (1869), (99 Am. Dec. 300); *City Fire, etc. Ins. Co. v. Carrugi*, 41 Ga. 660 (1871); *Royal British Bank v. Turquand*, 6 El. & Bl. 327 (1856).

first instance; and it cannot be estopped from pleading *ultra vires*, because all persons having dealings with it are bound to take notice of the limitations of its charter.¹ If, however, the execution of the lease is within the powers of the contracting corporations, but either has failed to conform to statutory regulations designed for the protection of its stockholders, the stockholders may ratify the lease and, as already shown, both the corporation and the stockholders may be estopped from denying its validity.²

§ 240. **Enforcement of Executory Ultra Vires Leases.** — While executed contracts made by corporations, in excess of their legal powers, have, in some jurisdictions, been upheld by the courts, and parties have been precluded from setting up, as a defence to actions brought by or against corporations, their want of power to enter into such contracts, the doctrine has never been applied to mere executory contracts.³

¹ *Union Pacific R. Co. v. Chicago, etc. R. Co.*, 163 U. S. 581 (1896), (16 Sup. Ct. Rep. 1173): "The general rule is that a contract by which a railroad company renders itself incapable of performing its duties to the public, or attempts to absolve itself from those obligations without the consent of the State, or a contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced, or rendered enforceable by the application of the doctrine of estoppel; . . . but where the subject-matter of the contract is not foreign to the purposes for which the corporation is created, a contract embracing 'whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorized, ought not, unless expressly prohibited, to be held by judicial construction to be *ultra vires*.'"

A legislative act purporting to ratify an *ultra vires* lease, is, in effect, a new grant of power. The acceptance of rent under an *ultra vires* lease does not make it valid. *Ogdensburgh, etc.*

R. Co. v. Vermont, etc. R. Co., 4 Hun (N. Y.), 268 (1875).

² *Boston, etc. R. Co. v. New York, etc. R. Co.*, 13 R. I. 260 (1881); *Humphreys v. St. Louis, etc. R. Co.*, 37 Fed. 307 (1889). See also *ante*, § 192: "*Acquiescence and Laches of Stockholders*;" *ante*, § 196: "*Corporation may be estopped from alleging Irregular Execution of Lease*."

³ *United States: Safety Insulated Wire, etc. Co. v. Baltimore*, 74 Fed. 135 (1890).

Massachusetts: In *White v. Buss*, 3 Cush. 449 (1849), Chief Justice Shaw laid down the rule as follows: "It is well settled by the authorities, that any promise, contract or undertaking, the performance of which would tend to promote, advance, or carry into effect an object or purpose which is unlawful, is in itself void and will not maintain an action."

New York: *Nassau Bank v. Jones*, 95 N. Y. 122 (1882). Also *Jemison v. Citizens Savings Bank*, 122 N. Y. 142 (1890), (25 N. E. Rep. 264); *Tracy v. Talmadge*, 14 N. Y. 162 (1856).

England: *Ashbury Railway Car-*

Public policy forbids *ultra vires* leases of railroads, and the authorities are practically unanimous in holding that in no way, directly or indirectly, will the courts allow an action to be maintained to enforce the provisions of such leases, while they remain executory.¹ They will not aid a corporation to enforce its unlawful contracts. They will not assist in diverting corporate funds to unauthorized objects, to the detriment of stockholders and creditors and prejudice of the rights of the State. While the application of this principle may allow a corporation to repudiate its contracts and escape its obligations, such result is incidental, and must be borne by the suffering party as a penalty for participating in an illegal enterprise.

Lord Mansfield thus tersely stated the position of the courts in *Holman v. Johnson*,² decided in 1775: "The objection that a contract is immoral or illegal as between the plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but is founded on general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this: *ex dolo malo non oritur actio*. No court will lend its

riage, etc. Co. v. Riche, L. R. 7 H. L. 653 (1875), L. R. 9 Ex. 224; Caledonian, etc. R. Co. v. Magistrates of Helensburgh, 2 Macq. 391 (1855).

¹ *United States*: Pullman Car Co. v. Central Transp. Co., 171 U. S. 138 (1898), (18 Sup. Ct. Rep. 808); St. Louis, etc. R. Co. v. Terre Haute, etc. R. Co., 145 U. S. 393 (1892), (12 Sup. Ct. Rep. 953); Central Transp. Co. v. Pullman Car Co., 139 U. S. 24 (1891), (11 Sup. Ct. Rep. 478); Oregon R., etc. Co. v. Oregonian R. Co., 130 U. S. 1 (1889), (9 Sup. Ct. Rep. 409); Pennsylvania R. Co. v. St. Louis, etc. R. Co., 118 U. S. 290 (1886), (6 Sup. Ct. Rep. 1094); Thomas v. Railroad Co., 101 U. S. 71 (1879).

Maine: Brunswick Gas Light Co.

v. United Gas, etc. Co., 85 Me. 532 (1893), (27 Atl. Rep. 525, 35 Am. St. Rep. 385).

New York: Compare Bath Gas Light Co. v. Claffy, 151 N. Y. 24 (1896), (45 N. E. Rep. 390); Woodruff v. Erie R. Co., 93 N. Y. 609 (1883).

England: East Anglian R. Co. v. Eastern Counties R. Co., 11 C. B. 775 (1851); McGregor v. Dover, etc. R. Co., 18 Q. B. 618 (1852).

² *Holman v. Johnson*, 1 Cowp. 341 (1775).

Lord Mansfield, in *Smith v. Bromley*, 2 Doug. 696 (1760), an earlier case, says: "If the act is in itself immoral, or a violation of the general laws of public policy, then the party paying shall not have his action."

aid to a man who founds his cause of action upon an immoral or an illegal act."

§ 241. **Delivery of Possession under Ultra Vires Lease.** — It has been held that the principle, enunciated by many courts, that a party to an *ultra vires* contract who has received the benefit of its full performance is estopped from questioning its validity, is applicable in the case of an unauthorized lease of a railroad where possession has passed, upon the ground that delivery of possession constitutes complete execution on the part of the lessor.¹ The weight of authority, however, supports the view that a lease is a *continuing* contract, as to rent and as to occupancy, and is *executory* in respect of its future performance.² Upon the principles just

¹ Camden, etc. R. Co. v. May's Landing, etc. R. Co., 48 N. J. L. 530 (1886), (7 Atl. Rep. 523). In this case (two judges dissenting), the Court allowed a recovery of rent accruing after an abandonment of an *ultra vires* lease, reaching the conclusion that the transaction was completed upon the part of the lessor by the delivery of the leased road, and that the other party should not be allowed to plead *ultra vires* when sued for not performing its part of the contract. The Court, however, said that the question is different where the State accuses a corporation of exceeding its powers, thus apparently adopting the doctrine, sometimes stated by courts, that the State alone can question *ultra vires* acts of corporations. This doctrine, however, while reasonable in many respects, is opposed to the great weight of authority.

² In Pennsylvania Co. v. St. Louis, etc. R. Co., 118 U. S. 316 (1886), (6 Sup. Ct. Rep. 1094), Mr. Justice Miller said: "It is argued in support of the decree, that, though the contract of the lease was void, so that no action could originally have been sustained upon it, there has been for ten years such performance of it, in the use, possession and control of plaintiff's road and its franchises by the defendant, that they cannot now be permitted to repudiate or

abandon it; that it now presents a class of cases which hold that where a void contract has been so far executed that property has passed under it and rights have been acquired under it, the courts will not disturb the possession of such property. . . . We know of no well-considered case where a corporation, which is a party to a *continuing contract*, which it had no power to make, seeks to retract and refuses to proceed further can be compelled to do so."

And in Oregon R., etc. Co. v. Oregonian R. Co., 130 U. S. 37 (1889), (9 Sup. Ct. Rep. 409), Mr. Justice Miller said: "To say that a contract which runs for ninety-six years, and which requires of both parties to it continual and actual operations and performance under it, becomes an executed contract by such performance for less than three years of the term, is carrying the doctrine much farther than it has ever been carried, and is, decidedly, a misnomer. This class of cases is not governed by the doctrine of part performance in a suit in equity for specific performance, nor is this a suit for specific performance. This is an action at law to recover money under a contract which is void, where for nearly three years the parties acted under it, but in which one of them refuses longer to be bound by its provisions; and the argument now

considered, therefore, no action can be maintained upon such a lease for any failure to further perform it, and the lessee may surrender an unexpired term without liability for damages.

§ 242. **Right and Duty of Disaffirmance.** — As an *ultra vires* lease of a railroad is forbidden by considerations of public policy, and involves a continuing violation of the obligations of the corporations to the State, it is the duty, as well as the right, of the parties to rescind and abandon it at the earliest possible moment; and this duty is a continuing one which is rendered none the less imperative by delay in its performance.¹

This right—and corresponding duty—of rescission is generally spoken of in the decisions as belonging to the lessee. Upon principle, however, there should be no distinction between the right and obligation of the lessee and of the lessor.

set up is that because the defendant has paid for all the actual use it made of the road, while engaged in the actual performance of the contract between the dates just given, it is thereby bound for more than ninety-three years longer by the contract which was made without lawful authority by its president and board of directors. We consider this proposition as needing no further consideration."

So in *Thomas v. Railroad Co.*, 101 U. S. 86 (1879), the Court said: "But what is sought in the case before us is the enforcement of the unexecuted part of this agreement. So far as it has been executed, namely, the four or five years of action under it, the accounts have been adjusted, and each party has received what he was entitled to by its terms. There remains unperformed the covenant to arbitrate with regard to the value of the contract. It is the damages provided for in that clause of the contract that are sued for in this action. Damages for a material part of the contract never performed; damages for the value of a contract which was void. It is not a case of a contract fully executed. The very nature of the suit is to recover damages for its non-perform-

ance. As to this it is not an executed contract."

See also *Central Transp. Co. v. Pullman Car Co.*, 139 U. S. 24 (1891), (11 Sup. Ct. Rep. 478); *Mallory v. Hanaur Oil Works*, 86 Tenn. 598 (1888), (8 S. W. Rep. 396). Compare *Heims Brewing Co. v. Flannery*, 137 Ill. 309 (1891), (27 N. E. Rep. 286.)

¹ A contract made by a corporation which is unlawful and void does not by being carried into execution become lawful and valid. The proper remedy of an aggrieved party is to disaffirm the contract. *Brunswick Gas Light Co. v. United States, etc. Co.*, 85 Me. 532 (1893), (27 Atl. Rep. 525, 35 Am. St. Rep. 385).

See also *Pullman Car Co. v. Central Transp. Co.*, 171 U. S. 151 (1898), (18 Sup. Ct. Rep. 808): "The right of recovery must rest upon a disaffirmance of the contract." Also *St. Louis, etc. R. Co. v. Terre Haute, etc. R. Co.*, 145 U. S. 393 (1892), (12 Sup. Ct. Rep. 953); *Central Transp. Co. v. Pullman Car Co.*, 139 U. S. 24 (1891), (11 Sup. Ct. Rep. 478); *Pennsylvania Co. v. St. Louis, etc. R. Co.*, 118 U. S. 290 (1886), (6 Sup. Ct. Rep. 1094); *Thomas v. Railroad Co.*, 101 U. S. 71 (1879).

They are both parties to an unlawful contract and owe the same duty to disaffirm it. Practically, however, the right may be said to be unilateral, owing to obstacles, placed by the courts, in the path of the lessor in recovering his property when the lessee has not repudiated the lease. Practically, also, the duty of rescission will rest lightly upon a lessor who risks the confiscation of his property by observing it. Thus, the Supreme Court of the United States has held that the parties to an unauthorized lease are guilty of a public wrong which precludes a court of equity from entertaining a bill by a lessor for relief from the lease and for a return of the property; and has intimated that neither a court of law nor of equity would grant a lessor, under such a lease, any relief in obtaining its property, so long as the lessee was satisfied.¹ And the Supreme Court of Texas has carried this doctrine to its logical conclusion by holding that a lessor, under an unauthorized lease, will not receive the aid of the courts in recovering its railroad, rent or a *quantum meruit*.²

This doctrine cannot be approved. The illegality of an *ultra vires* lease involves no moral turpitude, and, while a court of equity might properly decline to disturb the possession of property acquired thereunder, a court of law should

¹ In *St. Louis, etc. R. Co. v. Terre Haute, etc. R. Co.*, 145 U. S. 393 (1892), (12 Sup. Ct. Rep. 953), Mr. Justice Gray said: "When the parties are *in pari delicto*, and the contract has been fully executed on the part of the plaintiff, by the conveyance of property, or by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract." This language was used with reference to an *ultra vires* lease which the lessor desired to cancel and under which a railroad had been transferred to and operated without objection by the lessee for seventeen years. The Court denied equitable relief and

used the language above stated, which is difficult to reconcile with its language in *Pullman Car Co. v. Central Transp. Co.*, 171 U. S. 138 (1898), (18 Sup. Ct. Rep. 808), and in *Central Transp. Co. v. Pullman Car Co.*, 139 U. S. 24 (1891), (11 Sup. Ct. Rep. 478), except upon the ground that the cases are distinguished by the lessee's repudiation of the lease in the latter cases. This, in effect, gives the lessee the exclusive right of repudiation, for if the lessor repudiates he is, according to the decision, without remedy.

² *Olcott v. International, etc. R. Co.*, (Tex. 1894), 28 S. W. Rep. 728. See note to § 243, *post*: "*Recovery of Property after Disaffirmance*," for further consideration of this remarkable decision.

always be open to a lessor corporation when it seeks to do its duty,—to abandon an illegal continuing contract and retake its property.¹ An action for such a purpose is not in affirmance, but in disaffirmance, of the lease, while the denial of a remedy permits the lessee to retain the property as long as it chooses and *gives effect* to an illegal lease.²

§ 243. **Recovery of Property after Disaffirmance.**—Upon the abandonment by a lessee corporation of an *ultra vires* lease, it is bound, upon principles of natural justice, to return the leased property to the lessor, or make compensation for its loss.³ However much the contractual powers of corporations may be limited by their charters, there is no limitation upon their power to make restitution of property acquired under an unlawful lease; “nor, as corporations, are they exempted from the common obligation to do justice which binds individuals, for this duty rests upon all persons alike, whether natural or artificial.”⁴

The Supreme Court of the United States, however, in a series of cases of controlling authority, holds that “in no way and through no channels, directly or indirectly, will the courts allow an action to be maintained for the recovery of property delivered under an illegal contract where, in order

¹ That ejectment will lie to recover possession of a railroad, see *St. Louis, etc. R. Co. v. Terre Haute, etc. R. Co.*, 33 Fed. 440 (1888); *Railroad Co. v. Johnson*, 119 U. S. 608 (1887), (7 Sup. Ct. Rep. 339).

² *Parkersburgh v. Brown*, 106 U. S. 503 (1882), (1 Sup. Ct. Rep. 442), (case of invalid bonds): “The enforcement of such rights is not in affirmance of the illegal contract, but is in disaffirmance of it.”

³ “To say that a corporation cannot sue or be sued upon an *ultra vires* arrangement is one thing. To say that it may retain the proceeds thereof which have come into its possession without making any compensation whatever to the person from whom it has obtained them, is something very different, and savors very much of an inducement to

fraud.” *Green’s Brice’s Ultra Vires* (2d Am. Ed.), 721.

Davis v. Old Colony R. Co., 131 Mass. 275 (1881), (*per* Gray, C. J.): “A corporation may indeed be bound to refund to a person, from whom it has received money or property for a purpose unauthorized by its charter, the value of that which it has actually received; for, in such a case, to maintain the action against the corporation is not to affirm, but to disaffirm, the illegal contract.” Citing *White v. Franklin Bank*, 22 Pick. (Mass.) 181 (1839); *Morville v. American Tract Soc.*, 123 Mass. 129 (1877); *In re Cork, etc. R. Co.*, L. R. 4 Ch. App. 748 (1869).

⁴ *Manchester, etc. R. Co. v. Concord, etc. R. Co.*, 66 N. H. 127 (1890), (20 Atl. Rep. 384).

to maintain such recovery, it is necessary to have recourse to that contract. The right of recovery must rest upon a disaffirmance of the contract, and it is permitted only because of the desire of courts to do justice as far as possible to the party who has made payment or delivered property under a void agreement and which in justice he ought to recover."¹ Upon these principles an action for the recovery of property delivered under an invalid lease, cannot be maintained thereon upon its rescission, but will lie upon the *implied* contract of the lessee to return, or, failing in that, to make compensation for the property which it has no right to retain.² An action at law should also be available for the recovery of the specific property, as well as a suit in equity for an accounting and restitution.³

¹ Pullman Car Co. v. Central Transp. Co., 171 U. S. 151 (1898), (18 Sup. Ct. Rep. 808), (*per* Peckham, J.). See also cases cited in note 2.

² Central Transp. Co. v. Pullman Car Co., 139 U. S. 24 (1891), (11 Sup. Ct. Rep. 478). See also Pennsylvania R. Co. v. St. Louis, etc. R. Co., 118 U. S. 317 (1886), (6 Sup. Ct. Rep. 1094); Brunswick Gas Light Co. v. United Gas, etc. Co., 85 Me. 532 (1893), (27 Atl. Rep. 525, 35 Am. St. Rep. 389).

In Railway Companies v. Keokuk Bridge Co., 131 U. S. 389 (1889), (9 Sup. Ct. Rep. 770), Justice Gray said: "According to many recent opinions of this court, a contract made by a corporation, which is unlawful and void because beyond the scope of its corporate powers, does not, by being carried into execution, become lawful and valid, but the proper remedy of the party aggrieved is by disaffirming the contract, and suing to recover, as on a *quantum meruit*, the value of what the defendant has actually received the benefit of." Citing Louisiana v. Wood, 102 U. S. 294 (1880); Parkersburg v. Brown, 106 U. S. 487 (1882), (1 Sup. Ct. Rep. 442); Chapman v. Douglas County, 107 U. S. 348 (1882), (2 Sup. Ct. Rep. 62); Salt Lake City v. Hollister, 118 U. S. 256 (1886), (6 Sup. Ct. Rep. 1055).

Compare, however, Olcott v. International, etc. R. Co. (Tex. 1894), 28 S. W. Rep. 728, which holds that a lessor, party to an *ultra vires* lease, will not receive the aid of the courts to obtain either the return of the property, rent or *quantum meruit* compensation; that both parties are *in pari delicto* and that the court will leave them where they have deliberately put themselves. This remarkable decision, permitting the absolute confiscation of the lessor's property, is the not illogical outcome of the decision of the Supreme Court of the United States in St. Louis, etc. R. Co. v. Terre Haute, etc. R. Co., 145 U. S. 393 (1892), (12 Sup. Ct. Rep. 593), to which reference was made in the last section.

³ A cross bill for an accounting, etc., was allowed, under the circumstances of the case, in Pullman Car Co. v. Central Transp. Co., 171 U. S. 138 (1898), (18 Sup. Ct. Rep. 808), and there is no reason, in principle, why such a bill should not be allowed in all cases where the leased property has been lost or destroyed. In the celebrated case referred to, the Court, upon the principle stated in the text, decided:

(a) That the lessor was entitled to recover from the lessee the value of the property transferred to it when the

§ 244. **Recovery on Quantum Meruit for Past Use.**— Upon the principle, just considered, that no action can be maintained upon an unlawful contract, it is held by the Supreme Court of the United States and other courts that no recovery can be had of rent, as such, due under an *ultra vires* lease, although the lessee, before disaffirmance, has enjoyed possession of the property according to its terms.¹ The lessor, however, while denied a recovery of the stipulated rent, may recover compensation, in an action for use and occupation based upon an implied agreement on the part of the lessee to pay the value of such use.² In such an action, on a *quantum*

lease took effect, with interest, as that property had substantially disappeared and could not be returned.

(b) That the market value of the lessor's shares was no measure of the value of the leased property, although it was its entire plant.

(c) That the lessor was not entitled to recover anything for the breaking up of its business.

For other cases as to the proper remedy, see *Louisiana v. Wood*, 102 U. S. 294 (1880); *Davis v. Old Colony R. Co.*, 131 Mass. 258 (1881); *New Castle Northern R. Co. v. Simpson*, 23 Fed. 214 (1885).

¹ *Pullman Car Co. v. Central Transp. Co.*, 171 U. S. 138 (1898), (18 Sup. Ct. Rep. 808); *Central Transp. Co. v. Pullman Car Co.*, 139 U. S. 60 (1891), (11 Sup. Ct. Rep. 478); *Oregon R., etc. Co. v. Oregonian R. Co.*, 130 U. S. 1 (1889), (9 Sup. Ct. Rep. 409); *Pennsylvania R. Co. v. St. Louis, etc. R. Co.*, 118 U. S. 290 (1886), (6 Sup. Ct. Rep. 1094); *Brunswick Gas Light Co. v. United Gas, etc. Co.*, 85 Me. 532 (1893), (27 Atl. Rep. 525, 35 Am. St. Rep. 389). See also *Union Bridge Co. v. Troy, etc. R. Co.*, 7 Lans. (N. Y.) 240 (1872), although this case is not in accordance with later New York authorities.

In *Olcott v. International, etc. R. Co.* (Tex. 1894), 28 S. W. Rep. 728, referred to in the last section, the court denied a lessor compensation based

either upon the lease or upon a *quantum meruit*. For reasons already pointed out, this decision is as far removed from good law as it is from just principles.

² *Brunswick Gas Light Co. v. United Gas, etc. Co.*, 85 Me. 532 (1893), (27 Atl. Rep. 525, 35 Am. St. Rep. 389); *Manchester, etc. R. Co. v. Concord R. Co.*, 66 N. H. 100 (1890), (20 Atl. Rep. 383). While the Supreme Court of the United States has not decided the precise question whether a recovery can be had upon a *quantum meruit* for past use under an *ultra vires* lease, it is apparent from its language in *Pullman Car Co. v. Central Transp. Co.*, 171 U. S. 150 (1898), (18 Sup. Ct. Rep. 808), and *Central Transp. Co. v. Pullman Car Co.*, 139 U. S. 60 (1891), (11 Sup. Ct. Rep. 478), that should the case come before it such recovery would be allowed. Thus in the latter case the Court said: "A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the

meruit, the lease may be introduced in evidence as in the nature of an admission of what is a reasonable rental, but it is held that it cannot govern or control the amount to be allowed.¹

On the other hand, it is held by other courts, under the leadership of the New York Court of Appeals, upon principles of estoppel, that the lessee is bound by the terms of the lease for the time he remains in possession, and that recovery of past due rent may be obtained by the lessor, *in an action on the lease*, although it may be void as to the public.² As said by Chief Judge Andrews in *Bath Gas Light Co. v. Claffy*:³ "The State has not intervened, and the possession of the property has now been restored to its original proprietors. The contract has been terminated as to the future, and all that remains undone is the payment by the lessee of the unpaid rent. We think the demands of public policy are fully satisfied by holding that, as to the public, the lease was void, but that, as between the parties, so long as the occupation under the lease continued, the lessee was bound to pay the rent, and that its recovery may be enforced by action on

unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or, failing to do that, to make compensation for property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract." Citing *Pittsburgh, etc. R. Co. v. Keokuk, etc. Bridge Co.*, 131 U. S. 371 (1881), (9 Sup. Ct. Rep. 770); *Salt Lake City v. Hollister*, 118 U. S. 263 (1886), (6 Sup. Ct. Rep. 1055); *Chapman v. Douglas Co.*, 107 U. S. 355 (1882), (2 Sup. Ct. Rep. 62); *Parkersburgh v. Brown*, 106 U. S. 503 (1882), (1 Sup. Ct. Rep. 442); *Louisiana v. Wood*, 102 U. S. 299 (1880); *Hitchcock v. Galveston*, 96 U. S. 350 (1887).

See also cases collected in dissenting opinion of Vann, J., in *Bath Gas Light Co. v. Claffy*, 151 N. Y. 45 (1896), (45 N. E. Rep. 390).

¹ *Brunswick Gas Light Co. v. United*

Gas, etc. Co., 85 Me. 532 (1893), (27 Atl. Rep. 525, 35 Am. St. Rep. 389).

² *Bath Gas Light Co. v. Claffy*, 151 N. Y. 24 (1896), (45 N. E. Rep. 390); *Woodruff v. Erie R. Co.*, 93 N. Y. 609 (1883); *Camden, etc. R. Co. v. May's Landing, etc. R. Co.*, 48 N. J. L. 530 (1886), (7 Atl. Rep. 523).

³ *Bath Gas Light Co. v. Claffy*, 151 N. Y. 34 (1896), (45 N. E. Rep. 390). In his opinion in this case, Chief Judge Andrews also declared that the decisions of the Supreme Court of the United States, already referred to, carry the doctrine of *ultra vires* to an unjust extent, "and the rank injustice which, as it seems to us, these cases sanction, justifies the observation of Lord St. Leonards in the case of *Eastern Counties R. Co. v. Hawkes*, 5 H. L. Cas. 370 (1855), that "the safety of men in their daily contracts requires that the doctrine of *ultra vires* should be confined within narrow limits."

the covenant. Public policy is promoted by the discouragement of fraud, and the maintenance of the obligations of contracts, and to permit a lessee of a corporation to escape the payment of rent by pleading the incapacity of the corporation to make the lease, although he has had the undisturbed enjoyment of the property, would be, we think, most inequitable and unjust. . . . We think the rule which should be applied is that the lessee is bound by the contract so long as he remains in possession."

Notwithstanding this reasoning it seems to follow as a necessary conclusion from the premise that an *ultra vires* lease is void that no action of any kind can be maintained upon it, and that no principles of estoppel can give it vitality. To hold that an *ultra vires* lease is void, and, at the same time, that it governs the rights of the parties in the matter of rent, that it is valid as to the past and void as to the future, is illogical, and gives a controlling effect to a void contract. "A void instrument governs nothing."¹ Nor is it necessary to adopt the New York rule in order to do justice to the parties. If the lessee pays, and the lessor receives, what the use of the property is reasonably worth, the result is equitable, although the one or the other may lose the benefit of the stipulations of an illegal contract.

§ 245. **Improvements made by Lessee under Ultra Vires Lease.**—As a general rule, a lessee corporation cannot recover from the lessor for improvements made upon the leased property during its occupancy under an unauthorized lease.² This rule necessarily applies in every case where an action for such recovery must be based upon the illegal contract.

¹ *Brunswick Gas Light Co. v. United Gas, etc. Co.*, 85 Me. 541 (1893), (27 Atl. Rep. 525, 35 Am. St. Rep. 389).

² In *Middlesex, etc. R. Co. v. Boston, etc. R. Co.*, 115 Mass. 347 (1874), (7 Am. Ry. Rep. 469), it was held that a lessee under an *ultra vires* lease could not recover from the lessor expenses of renewing the road.

See also *East Tennessee, etc. R. Co. v. Nashville, etc. R. Co.* (Tenn. 1897), (51 S. W. Rep. 202).

State v. McMinnville, etc. R. Co., 6 Lea (Tenn.), 369 (1880), (4 Am. & Eng. R. Cas. 95), was the case of a lease by a receiver without authority, and, under the circumstances stated in the opinion, the Court was justified in saying (p. 379): "The tenant voluntarily takes his chances of being permitted to enjoy the expenditures he has made upon the land of another."

It is clear, however, upon the principle stated by the Supreme Court of the United States that "a contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, *have always striven to do justice between the parties*,"¹ that exceptions to the rule may be established where it is not necessary to rely upon the lease. Thus, where improvements of a permanent nature have been made by a lessee, with the approval of the lessor, who then terminates the lease on account of its *ultra vires* character, the courts would undoubtedly allow the lessee to set off against the lessor's demand for compensation for the use of the property, compensation for improvements made upon it.

§ 246. **Effect of Ultra Vires Lease upon Stock Subscriptions.**—If a railroad company has power to lease its railroad, subscriptions to its capital stock must be regarded as having been made in view of the possible exercise of the power. If a lease is unauthorized it is void, and without effect upon contracts of subscription. In neither case—under authorized or unauthorized lease—is a subscriber discharged upon his obligation to pay calls and fulfil his contract.²

The conclusion that an *ultra vires* lease, being void, has no effect upon stock subscriptions is, obviously, logical. It is in marked contrast to the conclusion reached, in the decisions examined in an earlier part of this treatise, that an unauthorized consolidation, although wholly void, discharges subscribers.³

¹ *Central Transp. Co. v. Pullman Car Co.*, 139 U. S. 60 (1891), (11 Sup. Ct. Rep. 478).

² *Ottawa, etc. R. Co. v. Black*, 79 Ill. 268 (1875): "If the company had no power to lease the road and its franchises, then the lease is void, and the appellees can, when they receive their stock, apply to a court of equity, and have the lease cancelled. If, on the other hand, the charter empowers the company to make such a lease, then ap-

pellees must have known the fact when they subscribed, and the exercise of a power granted by the charter must be presumed to have been contemplated by the appellees when they gave their note."

See also *Hayes v. Ottawa, etc. R. Co.*, 61 Ill. 424 (1871); *Troy, etc. R. Co. v. Kerr*, 17 Barb. (N. Y.) 581 (1854).

³ See *ante*, § 47: "*Rights and Remedies of Dissenting Subscribers.*"

§ 247. **Guarantee of Ultra Vires Lease void.** — Where the contracting corporations to a lease of a railroad are without authority to enter into it, an agreement by another corporation guaranteeing its performance, it is equally without authority. A guarantee of a void contract is itself void. A contract to fulfil for another corporation obligations which it has no power to assume is of no legal effect.¹

In *Pennsylvania Co. v. St. Louis, etc. R. Co.*, Mr. Justice Miller said:² “There is no power shown in any of these companies to accept a lease of the complainant such as the one in the present case, and perform its conditions, and they cannot, therefore, become parties to such a contract with a road outside the State which chartered them any more than the principal company. If these guaranteeing companies had executed the original contract of lease it would have been void for want of authority from the legislature of Indiana, or of any other State by whose laws they are incorporated or endowed with corporate power. No such power is shown in them to lease roads beyond their own States. Indeed, while there may be a just claim of authority for some kind of running arrangement between two connecting roads under the Indiana statutes, there is no connection between the plaintiff’s road and any road of a guaranteeing company. The connection, even by traffic, is remote. These companies might as well have assumed the power to loan them money, or to indorse their notes, or any other commercial transaction, as to guarantee the performance of a void contract by one company to another.”

§ 248. **Voidable Railroad Leases.** — Officers of a railroad company stand in a fiduciary relation to the corporation. They cannot, themselves, take a lease of its property nor lease property to it.³ They cannot, as directors of one corporation,

¹ *Pennsylvania R. Co. v. St. Louis, etc. R. Co.*, 118 U. S. 290 (1885), (6 Sup. Ct. Rep. 1094); *Coleman v. Eastern Counties R. Co.*, 10 Beav. 1 (1846); *Madison, etc. Plank Road Co. v. Watertown, etc. Plank Road Co.*, 7 Wis. 59 (1858).

See also *Pearce v. Madison, etc. R. Co.*, 21 (How. (U. S.) 441 (1858).

² *Pennsylvania Co. v. St. Louis, etc. R. Co.*, 118 U. S. 314 (1885), (6 Sup. Rep. 1094).

³ In *Wardell v. Railroad Co.*, 103 U. S. 658 (1880), the Supreme Court of

lease its railroad to another corporation to which they stand in similar relation. The rule is based upon considerations of public policy and works independently of fraud or good intention. Any such lease is voidable at the option of either corporation.¹ It is not void, and may become valid by acquiescence.²

The majority of the stockholders of a railroad company, in controlling its affairs, stand in a similar position of trust towards the minority stockholders.³ They cannot authorize the officers of the corporation to lease its railroad to another

the United States laid down the following general principles relating to the obligations of officers of corporations: "It is among the rudiments of the law that the same person cannot act for himself, and at the same time, with respect to the same matter, as the agent of another whose interests are conflicting. . . . The law, therefore, will always condemn the transactions of a party on his own behalf, where, in respect to the matter concerned, he is the agent of others, and will relieve against them whenever their enforcement is seasonably resisted. Directors of corporations, and all persons who stand in a fiduciary relation to other parties, and are clothed with power to act for them, are subject to this rule. They are not permitted to occupy a position which will conflict with the interests of the parties they represent and are bound to protect. They cannot, as agents or trustees, enter into or authorize contracts on behalf of others for whom they are appointed to act, and then personally participate in the benefits. Hence all arrangements by directors of a railroad company to secure an undue advantage to themselves at its expense by the formation of a new company as auxiliary to the original one, with an understanding that they, or some of them, shall take stock in it, and then that valuable contracts shall be given to it, in the profits of which they, as stockholders in the new company are to share, are so many unlawful devices to enrich

themselves to the detriment of the stockholders and creditors of the original company, and will be condemned whenever properly brought before the court for consideration."

¹ *Barr v. New York, etc. R. Co.*, 125 N. Y. 263 (1891), (26 N. E. Rep. 145); *Jessup v. Illinois Central R. Co.*, 43 Fed. 483 (1890); *Meeker v. Winthrop Iron Co.*, 17 Fed. 48 (1883). See also *ante*, § 168: "*Voidable Leases.*"

Stockholders cannot sue for the profits arising from a lease of a railroad to their corporation, in which the directors wrongfully participated, unless they also take steps to rescind the lease. *Hitchcock v. Barrett*, 50 Fed. 653 (1892).

In *Wallace v. Long Island R. Co.* 12 Hun (N. Y.), 464 (1877), the Court said: "The mere fact that the same persons were directors of the corporation which made the lease, and of that which took it, is not of itself sufficient to avoid the contract at the instance of one or more stockholders, against the will of the corporation. That fact alone might entitle either corporation to avoid the lease, but I apprehend it does not give that right to a stockholder."

² *Barr v. New York, etc. R. Co.*, 125 N. Y. 263 (1891), (26 N. E. Rep. 145), *Jessup v. Illinois Central R. Co.*, 43 Fed. 483 (1890).

³ See *post*, § 300: "*Trust Relation of Controlling Corporation to Minority Stockholders.*"

corporation, owned or controlled by them, unless they act with the utmost good faith towards the whole body of stockholders. Courts of equity will protect the interests of minority stockholders.¹

§ 249. **Leases of Railroads for Purpose of suppressing Competition.** — Combinations of railroad companies for the purpose of extinguishing competition are contrary to public policy. The form of combination is immaterial. That in the form of a lease is as invalid as any other.

This subject is considered at length in the concluding part of this treatise.²

§ 250. **Remedy of State — Quo Warranto.** — When a railroad company, without legislative authority, leases its railroad and franchises for an extended term to another corporation, it thereby abandons the use of its franchises, and its charter becomes subject to forfeiture in *quo warranto* proceedings.³

In *State v. Atchison, etc. R. Co.*⁴ the Supreme Court of Nebraska said: "While a lessee in a proper case, or assignee or purchaser, will take a road burdened with the conditions, obligations and duties assumed by the original corporation, yet there can be no such transfer by lease, assignment, or sale without express statutory authority, and, as we find no

¹ *Pondir v. New York, etc. R. Co.*, 72 Hun (N. Y.), 384 (1893), (25 N. Y. Supp. 560). See also *Miner v. Belle Isle Ice Co.*, 93 Mich. 97 (1892), (53 N. W. Rep. 218, 17 L. R. A. 412); *Meeker v. Winthrop Iron Co.*, 17 Fed. 48 (1883).

See also *ante*, § 168: "*Voidable Leases.*"

² See *post*, Part V: "*Combinations of Corporations.*"

³ *State v. Atchison, etc. R. Co.*, 24 Neb. 143 (1888), (38 N. W. Rep. 43, 8 Am. St. Rep. 164); *Commissioners of Tippecanoe Co. v. Lafayette, etc. R. Co.*, 50 Ind. 85 (1875). In *East Line, etc. R. Co. v. State*, 75 Tex. 434, (1889), (12 S. W. Rep. 690), *quo warranto* was sustained, forfeiting the charter of the defendant railroad company because of an illegal transfer of its railroad and franchises. See also *State*

v. Minnesota Central R. Co., 36 Minn. 246 (1886), (30 N. W. Rep. 816).

In *Eel River R. Co. v. State*, 155 Ind. 433 (1900), (57 N. E. Rep. 388), it was held that the acts of a domestic railroad company in turning over all its property and franchises to a rival company under a lease in perpetuity, and in acquiescing in the destruction of a portion of its railroad in order to destroy competition, were sufficient grounds to authorize a forfeiture of its franchises.

⁴ *State v. Atchison, etc. R. Co.*, 24 Neb. 163 (1888), (38 N. W. Rep. 43, 8 Am. St. Rep. 164). In this case, however, the Court said that forfeiture would not be enforced in the first instance, and the lease was declared void.

such authority, and the defendant has been guilty of misuser and non-user of its franchises, they are subject to forfeiture.”¹

§ 251. **Remedy of State — Injunction.** — As already shown, the remedy of the State, in the case of *ultra vires* acts committed by a corporation, is *quo warranto*, and, in the case of private corporations, this remedy is exclusive.² Courts of equity are not open to the State for the exercise of visitorial powers over such corporations, and injunction is not a proper remedy to restrain their unauthorized acts. Lord Cowper, in a very early English case,³ denied the attorney general a remedy in equity against a corporate excess of powers upon the ground that “it would usurp too much on the king’s bench;” and such is substantially the reason of the rule at the present time — adequate remedy at law.

This rule is also, undoubtedly, applicable, in the case of a *quasi*-public corporation, where the *ultra vires* act relates merely to the internal affairs of the corporation; but where it involves the relations of the corporation to the State and may injuriously affect the public interests, it is inapplicable; and the State may file a bill in equity and obtain an injunction restraining the exercise of the power usurped.⁴ This remedy

¹ Even the consent of the State to a transfer may not prevent forfeiture under certain circumstances. This principle is illustrated in *State v. St. Paul, etc. R. Co.*, 35 Minn. 225 (1886), (28 N. W. Rep. 3): “The consent of the State may not prevent a forfeiture of the corporate franchise, where the corporation disposes of and abandons all its business and operating franchises, so that there is nothing left which it can lawfully do, and so that there can be no reason for keeping it longer in life.”

² *Attorney General v. Utica Ins. Co.*, 2 Johns. Ch. 371 (1817). In this case Chancellor Kent declined to enjoin an insurance company from doing a banking business. The equitable remedy is, however, now open to the State, in New York, under the Code of Civil Procedure, in relation to the “judicial supervision” of corporations.

People v. Ballard, 134 N. Y. 269 (1892), (32 N. E. Rep. 54). In *Attorney General v. Tudor Ice Co.*, 104 Mass. 239 (1870), where an injunction to restrain an ice company from importing teas was refused, the cases bearing upon the rights of the State in a court of equity are collected and carefully considered.

³ *Attorney General v. Reynolds*, 1 Eq. Cas. Ab. (3d Ed.) 131 (1705).

⁴ The attorney general has the right, when the property of the sovereign, or the interests of the public are directly concerned, to institute suit for their protection, by information at law or in equity, without a relator. *Attorney General v. Delaware, etc. R. Co.*, 36 N. J. Eq. 631 (1876).

In *Attorney General v. Great Northern R. Co.*, 1 Dr. & Sm. 154 (1860), a railroad company was restrained from trading in coal in large quantities. See

is especially available in the case of railroad companies, which exercise the power of eminent domain by delegation from the State; and an *ultra vires* lease of a railroad and franchises, forbidden by public policy, may be restrained in its execution and performance at the suit of the State. Where such a lease is not only unauthorized but is forbidden by statutory¹ or constitutional² provisions, or tends to the creation of a monopoly,³ the inadequacy of *quo warranto* as a preventive remedy is apparent.

also *State v. Dodge, etc. R. Co.*, 53 Kan. 377 (1894), (36 Pac. Rep. 747); *Attorney General v. Jamaica Pond Aqueduct*, 133 Mass. 361 (1882); *United States v. Western Union Tel. Co.*, 50 Fed. Rep. 28 (1892), *affirmed*, 160 U. S. 53 (1895), (16 Sup. Ct. Rep. 210); *Attorney General v. Chicago, etc. R. Co.*, 35 Wis. 425 (1874); *Buck Mountain Coal Co. v. Lehigh Coal, etc. Co.*, 50 Pa. St. 91 (1865); *Attorney General v. Mid-Kent R. Co.*, L. R. 3 Ch. App. 100 (1867); *Ware v. Regent's Canal Co.*, 3 De Gex & J. 212 (1858); *Hare v. London, etc. R. Co.*, 2 Johns. & Hem. 80 (1861). Compare, however, *Attorney General v. Great Eastern R. Co.*, L. R. 11 Ch. D. 449 (1879).

¹ In *Stockton v. Central R. Co.*, 50 N. J. Eq. 52 (1892), (24 Atl. Rep. 964), the Attorney General of New Jersey filed a bill in equity to have the lease of the Central Railroad Company of New Jersey to the Port Reading Railroad Company, a small New Jersey corporation controlled by the Philadelphia and Reading Railroad Company, declared to be *ultra vires* and void, and for an injunction against taking possession thereunder. The Court held that the lease was, in effect, a lease to the Philadelphia and Reading Railroad Company — a foreign corporation; that it was not only unauthorized, but forbidden by the New Jersey statute; that its effect was to partially destroy competition in the production of sale of anthracite coal; that it was *ultra vires*,

and tended to a monopoly; and granted the relief prayed for. It is of interest to note that the Central Railroad Company of New Jersey is now controlled by the Reading Railroad Company through the ownership of stock upon which it has issued collateral trust bonds — a convenient alternative to a lease.

² The State may maintain a suit to enjoin a railroad company from purchasing the property and lines of other companies, in violation of Kentucky Constitution, § 201, providing that no railroad company shall acquire, by purchase or otherwise, any parallel or competing line. *Louisville, etc. R. Co. v. Commonwealth*, 97 Ky. 675 (1895), (31 S. W. Rep. 476) (*affirmed sub nom. Louisville, etc. R. Co. v. Kentucky*, 161 U. S. 677), (1896), (16 Sup. Ct. Rep. 714), where the Court said (p. 695): "It is contended injunction is not the proper remedy. But it seems to us if the Commonwealth of Kentucky can sue at all for act *ultra vires* by a corporation, there is no room for disputing its right to a preventive injunction in this case. For, according to very reputable authority, and, we think, upon principle, a court of equity has jurisdiction, and may, in an action by the State, enjoin a corporation from exceeding its chartered powers, or doing acts otherwise illegal and injurious to the public."

³ *Stockton v. Central R. Co.*, 50 N. J. Eq. 52 (1892), (24 Atl. Rep. 964).

CHAPTER XXIII.

LEASES TO FOREIGN CORPORATIONS.

§ 252. Authority to lease must be derived from State where Railroad is located.

§ 253. Authority to lease to Foreign Corporation.

§ 254. Status of Foreign Corporation leasing Railroad.

§ 252. Authority to lease must be derived from State where Railroad is located. — The charter of a corporation granted by a State has no binding force *proprio vigore* outside its territorial limits. As said in an early case: "Every power which a corporation exercises in another State, depends for its validity upon the laws of the sovereignty in which it is exercised."¹

While, by the comity between States, a foreign railroad company may be permitted, within a State, to make contracts and exercise ordinary powers in the general transaction of business, such a corporation cannot lease or take a lease of a railroad, without the consent of the State in which it is located.² The State, in authorizing the building of a railroad within its borders, reserves the right to control its transfer.

The rule that a railroad lease is invalid unless each corporation is authorized thereto by the State of its creation, requires

¹ Runyan v. Coster's Lessee, 14 Pet. (U. S.) 122 (1840).

² Briscoe v. Southern Kansas R. Co., 40 Fed. 280 (1889): "It is decided in Bank v. Earle, 13 Pet. 524 (1839), that courts of justice have always expounded and executed contracts according to the law of the place in which they are made, provided that the law was not repugnant to the laws or policy of their own country. The court, in the above case, held the rule to be 'that, by the comity of nations, foreign corporations are allowed to make contracts under their respective limits not contrary to the known policy of such nations, or injurious to their interests.' This gives a railroad corporation the right to exercise all its ordinary powers growing

out of its franchise, such as making contracts in regard to the transaction of its business, as was the case in Railroad Company v. Gebhard, 109 U. S. 527 (1883), (3 Sup. Ct. Rep. 363). But when it undertakes, by a lease of its road, to get rid of its responsibility, or liabilities to the public, which it assumed when it accepted the franchise, it would be exercising an extraordinary power, which may be greatly prejudicial to the public, and therefore is contrary to the known policy of a State, and injurious to its interests, and cannot be exercised unless the State, by express authority conferred, authorizes it to be done." See also Howard v. Chesapeake, etc. R. Co., 11 App. Cas. (D. C.) 300 (1897).

the additional provision that the State in which the railroad is situated shall give its approval. Only in a case where a railroad company owns a railroad in a foreign State will the additional requirement impose an additional obligation.

This limitation upon the power of a corporation in a foreign State is not founded upon the principle of *ultra vires*. A corporation may be expressly authorized by its charter to transact business in foreign countries and States.¹ Its articles of association — when formed under general laws — may, in terms, authorize it to lease railroads in other States. The power so granted or assumed can be exercised only by permission of the foreign State. It is not so much a question of corporate power as of the right to exercise it.²

§ 253. **Authority to lease to Foreign Corporation.** — As shown in the last section, a corporation created by one State cannot take a lease of a railroad situated in another State without its permission. Many States have passed general laws granting this permission to foreign railroad companies, which have already been referred to.³

Under such statutes, a lease of a railroad may be lawfully taken by a foreign corporation provided it is, itself, acting within the powers conferred by the State of its creation. Thus, under the New York statute authorizing railroad companies “to contract with each other,” it was held that a New York corporation might take a lease of a railroad in Vermont, owned and operated by a corporation of that State, where such corporation was given by its charter power to enter into such a contract.⁴

¹ An examination of broad charters granted by certain States will disclose the curious fact that corporations are often authorized to exercise most extraordinary powers, provided they do not exercise them within the limits of the State granting them.

² Where the incorporators under an English Companies' Act inserted in the articles of association a power to lease railroads in foreign countries, it was held that the corporation acquired thereby no authority to lease a railroad

in Oregon. Power to act in foreign countries cannot be so created by the parties themselves. *Oregon R., etc. Co. v. Oregonian R. Co.*, 130 U. S. 1 (1889), (9 Sup. Ct. Rep. 409), *reversing* 22 Fed. 245 (1884), and 23 Fed. 232 (1885).

³ See *ante*, § 180: “*What Railroads may be leased. Statutory Provisions.*”

⁴ *Day v. Ogdensburgh, etc. R. Co.*, 107 N. Y. 129 (1887), (13 N. E. Rep. 765): “It is next argued for the respondents that the arrangement ex-

Upon the principle that power to lease to a foreign corporation must be clearly expressed, the Supreme Court of New Jersey held that a statute of that State authorizing a railroad and canal company to make arrangements for connection or consolidation of business by agreement, contract or lease "with any other railroad or canal company in this State or otherwise" did not authorize a lease to a corporation not of that State.¹ The Court said: "No power is given to lease to a company out of this State unless the word 'otherwise,' which is not an adverb of place, is held to mean 'otherwhere.' It is an inappropriate word to express such meaning."²

A Minnesota statute providing that "any railroad corporation may lease or purchase any part or all of any railroad constructed by another corporation whose lines of road are continuous or connected with its own" has been held, in view of its title and other statutory provisions, to confer authority only for a lease between corporations of that State.³

pressed through these instruments, so far as the Ogdensburgh & Lake Champlain Railroad Company is concerned, is beyond the capacity and power of that corporation. We have seen that the Vermont Railroad Company had corporate powers, and among those expressly given by its charter is a power to lease its road. It had, therefore, contracting capacity, and was a good party to deal with. The Ogdensburgh & Lake Champlain Railroad, on its part, lacked no power expressly given by statute to similar corporations in this State, nor any which, as incident and necessary thereto, might enable it to carry on the objects of the incorporation. . . . Unless we are to . . . say that its operation must be confined to contracts with roads operating in and under the laws of this State, the lease must be held valid between the parties. We see no reason for such restriction nor any principle of public law which requires it. We are not at liberty to create it. It would be legislation, not construction. A corporation given capacity to contract, may exercise that capacity with any party

in or outside the limits of the State, unless the law-making power of that other State forbids." *Compare* *Briscoe v. Southern Kan. R. Co.*, 40 Fed. 273 (1889).

¹ *Black v. Delaware, etc. Canal Co.*, 24 N. J. Eq. 475 (1873). *Compare* *Stewart v. Lehigh Valley R. Co.*, 38 N. J. L. 505 (1875).

The New Jersey act of 1885, forbidding any lease of a railroad to a foreign corporation without the consent of the legislature, could not be evaded by a nominal lease to a domestic corporation whose stock was owned by a foreign corporation, which was the real lessee. *Stockton v. Central R. Co.*, 50 N. J. Eq. 75 (1892), (24 Atl. Rep. 964).

² Notwithstanding the reasoning of the Court it seems entirely clear that the legislature *did* use the word "otherwise" precisely in the sense of "otherwhere," and intended to include corporations within and without the State.

³ *Freeman v. Minneapolis, etc. R. Co.*, 28 Minn. 443 (1881), (10 N. W. Rep. 594).

In *St. Louis, etc. R. Co. v. Terre*

§ 254. **Status of Foreign Corporation leasing Railroad.**— Statutes authorizing the leasing of railroads located within the State to corporations of another State often define the *status*, and prescribe the rights and duties, of the foreign lessee corporation.¹

In the absence of express statutory provision, a corporation of another State, operating a domestic railroad, takes it subject to all the conditions and burdens attaching to it, and to the obligations respecting the operation of railroads imposed by the laws of the State in which it is located upon railroad companies generally.²

Haute, etc. R. Co., 33 Fed. 440 (1888), *affirmed* 145 U. S. 393 (1892), (12 Sup. Ct. Rep. 953), it was held that a lease of a railroad, executed by an Illinois railway company to an Indiana company, was invalid, because the latter company was not authorized to accept a lease from an Illinois corporation.

¹ The following contains the substance of several statutes relating to foreign lessee corporations:

Arkansas. San. & H. Dig. 1894, § 6334: A corporation of another State being a lessee of a railroad in this State, shall likewise be held liable for violation of laws of this State, and may be sued and sue in all cases, and for the same causes and in the same manner, as a corporation of this State.

Kansas. G. S. 1897, ch. 70, § 96: A railroad company of another State which shall lease a railroad in this State shall possess, in this State, all the rights, powers, privileges and franchises conferred by the laws of this State upon a railroad company of this State.

Michigan. P. A. 1901, Act No. 30,

page 50: "The foreign railroad company so leasing shall operate and hold the railroad subject to all the duties and obligations and with all the rights and privileges prescribed by the general railroad law of this State."

Missouri. R. S. 1899, § 1060: If a railroad company of another State shall lease a railroad in this State it shall be held liable for the violation of any laws of this State, and may sue and be sued for the same causes and in the same manner as a corporation of this State.

Nebraska. Comp. Stat. 1901, § 1768: A railroad company of another State which shall lease a railroad in this State shall possess all rights, powers, privileges and franchises possessed by corporations of this State.

South Dakota. Anno. Stat. 1901, § 3906: Similar to Nebraska statute, *supra*.

Wyoming. R. S. 1899, § 3206: Similar to Nebraska statute, *supra*. Also confers the right of eminent domain.

² *McCandless v. Richmond, etc. R. Co.*, 38 S. C. 103 (1892), (16 S. E. Rep. 429).

CHAPTER XXIV.

TRACKAGE CONTRACTS.

- § 255. Nature of a Trackage Contract.
- § 256. Express Authority not necessary for Execution of Trackage Contract.
- § 257. Execution of Trackage Contracts.
- § 258. Assignability of Trackage Contracts.
- § 259. Construction of Trackage Contracts.
- § 260. Specific Performance of Trackage Contracts.
- § 261. Liability of Proprietary Company to Third Persons.
- § 262. Liability of Licensee Company to Third Persons.
- § 263. Liability to Employees.

§ 255. **Nature of a Trackage Contract.** — A trackage contract is an agreement by which one railway company lets another company into a joint use of a portion of its tracks. It is clearly distinguishable from a lease in that it conveys no estate in the property and no right to its exclusive possession.¹ It is in the nature of a license — although non-revocable and enforceable — or a grant of a privilege for hire.²

Trackage contracts may be made upon any basis the contracting corporations determine. Contracts upon a “wheelage” or “mileage” basis are common.

¹ *Union Pacific R. Co. v. Chicago, etc. R. Co.*, 163 U. S. 583 (1895), (16 Sup. Ct. Rep. 1173): “The contract in this regard was really an agreement for trackage rights, for running arrangements, a ‘terminal contract’ with compensation upon a ‘mileage’ or ‘wheelage’ basis . . . (p. 593). The stipulations of the contract relating to the use of the Rock Island tracks between South Omaha and Lincoln by the Pacific Company did not embrace the acquisition of right of way or real estate.”

A statutory right in one corporation to use the land of another company for the purpose of making connections has, however, been held to be an “interest in lands” within the provision of the Statute of Frauds. *Port Jervis, etc. R.*

Co. v. New York, etc. R. Co., 132 N. Y. 445 (1892), (30 N. E. Rep. 855).

² In *Coney Island, etc. R. Co. v. Brooklyn Cable Co.*, 53 Hun (N. Y.), 170 (1889), (6 N. Y. Supp. 108), the Court said: “The contract here is a mere license or privilege for hire. It is not a lease conveying an interest in the realty but an agreement containing mutual stipulations in the nature of a license. It is clear the intent was to permit the first licensee to run its cars over the tracks mentioned. Had it been designed to cover any more than such a privilege other terms would have been used to indicate such an intention.”

See also *Richmond, etc. R. Co. v. Durham, etc. R. Co.*, 104 N. C. 658 (1889), (40 Am. & Eng. R. Cas. 488, 10 S. E. Rep. 659).

In England, the right of a railway company to work its traffic over a portion of the line of another company does not, as a general rule, depend upon the ability of the two corporations to agree upon a contract. Many railway acts grant the right to one company to exercise "running powers" — as they are designated — over the tracks of another and provide that, in case of disagreement as to the compensation to be paid, the matter shall be submitted to arbitration.¹

Similar statutes compelling railroad companies to furnish facilities to intersecting roads for the purpose of making track connections, and providing for the ascertainment of compensation therefor, have been enacted in many American States.²

§ 256. **Express Authority not necessary for Execution of Trackage Contract.** — Express authority is not necessary to enable a railroad company to enter into a trackage contract granting to another company, in common with itself, the right to use a portion of its tracks and facilities, not required for the exercise of its own franchises. The rule that a railroad company cannot, without legislative authority, alienate its franchises, or property necessary for the discharge of its duties to

¹ For general statute see Railway Clauses Act of 1845, § 92.

Where an act provided that the running powers granted were to be exercised upon *terms* to be agreed upon, or in default of agreement to be settled by arbitration, and the owners of the railway were to make all arrangements required by the agreement or arbitration, it was held that "terms" included the necessary arrangements for regulating the joint traffic. *Swansea, etc. R. Co. v. Swansea, etc. R. Co.*, 3 Ry. & C. T. Cases, 339 (1879).

Where an act gave a railway company running powers over part of the line of another company for "local traffic" it was held that that phrase meant "traffic from one known station to another on the line." *Midland R. Co. v. Manchester, etc. R. Co.*, 22 L. T. Rep. 601 (1870). See also *Plymouth, etc. R. Co. v. Great Western R. Co.*, 6 Ry. & C. T. Cases 101 (1889).

For other cases construing acts of

Parliament granting running powers and providing for the ascertainment of compensation see *Midland R. Co. v. Neath, etc. R. Co.*, 2 Ry. & C. T. Cases, 366 (1876); *Caledonia R. Co. v. North British R. Co.*, 2 Ry. & C. T. Cases, 271 (1875); *Taff Vale R. Co. v. Ryhmney R. Co.*, 2 Ry. & C. T. Cases, 176 (1875); *South Devon R. Co. v. Devon, etc. R. Co.*, 2 Ry. & C. T. Cases, 348 (1876).

² See *New York* statute construed in *Port Jervis, etc. R. Co. v. New York, etc. R. Co.*, 132 N. Y. 439 (1892), (30 N. E. Rep. 855). Also *Pennsylvania* statute construed in *Altoona, etc. R. Co. v. Beech Creek R. Co.*, 177 Pa. St. 443 (1896), (35 Atl. Rep. 734).

An *Ohio* statute authorizing railroad companies to make "running arrangements" with other companies is construed in *Stanley v. Cleveland, etc. R. Co.*, 18 Ohio St. 552 (1869).

For charter provision see *Olcott v. Tioga R. Co.*, 27 N. Y. 546 (1863).

the public, has no application. The owner of the railroad under such a contract transfers no franchise, parts with no property and is not excluded from the use and enjoyment of its property and franchises. It merely grants the surplus use of its tracks.¹

In *Union Pacific R. Co. v. Chicago, etc. R. Co.*² the Supreme Court of the United States said: "By the contract the Pacific Company parted with no franchise, and was not excluded from any part of its property or the full enjoyment of it. What it agreed to do was to let the Rock Island into such use of the bridge and tracks as it did not need for its own purposes. This did not alien any property or right necessary to the discharge of its public obligations and duties, but simply widened the extent of the use of its property for the same purposes for which that property was acquired, to its own profit so far as that use was concerned, and in the furtherance of the demands of a wise public policy. If, by so doing, it may have assisted a competitor, it does not lie in its mouth to urge that as rendering its contract illegal as opposed to public policy. Ability to perform its own immediate duties to the public is the limitation on its *jus disponendi* we are considering, and that limitation had no application to such a use as that in question."

One railroad company, however, has no implied power to grant to another company such extensive running privileges as to amount, practically, to turning over the control of its road.³

¹ See *ante*, § 172: "*Leases of Surplus Property.*"

² *Union Pacific R. Co. v. Chicago, etc. R. Co.*, 163 U. S. 589 (1896), (16 Sup. Ct. Rep. 1173), *per* Fuller, C. J., *affirming* 51 Fed. 309 (1892).

³ "Corporations may make all necessary arrangements for cheaply and expeditiously developing or carrying on their particular business; but it is another thing, going beyond this, to enter into contracts, for instance, by which the exclusive control or the exclusive right of working the line is handed over to other parties. All such

arrangements, whatever their form, however disguised, are *ultra vires* and void." *Green's Brice's Ultra Vires* 427. See also *Earle v. Seattle, etc. R. Co.*, 46 Fed. 909 (1893); *Ohio, etc. R. Co. v. Indianapolis, etc. R. Co.*, 5 Am. L. Reg. (N. S.) 733 (1866); *Attorney General v. Great Eastern R. Co.*, L. R. 11 Ch. Div. 449 (1879); *Johnson v. Shrewsbury, etc. R. Co.*, 3 De Gex, M. & G. 914 (1853); *Gardner v. London, etc. R. Co.*, L. R. 2 Ch. App. 212 (1867); *Beman v. Rufford*, 6 Eng. L. & Eq. 106 (1851), (15 Jur. 914).

Under the English Railway Clauses

The power of a railroad company to accept a grant of running privileges depends upon the limitations of its charter. It cannot exercise running powers over a railroad beyond its authorized *termini*. It cannot use a truckage contract as a means of extending the limits within which it may operate a railroad.¹ But within the limits prescribed by its charter, a railroad company has implied power to acquire running privileges over the railroad of another company, wherever such privileges furnish it an advantageous means of reaching a desired point.²

§ 257. **Execution of Trackage Contracts.**—The corporate power—implied or expressly conferred—involved in the authorization and execution of a truckage contract may be exercised by the board of directors of a railroad company in the management of the regular business of the corporation.³ The power of the directors, however, is not so exclusive as to preclude action by the stockholders.⁴

The New York Court of Appeals has intimated that the right, provided by a statute authorizing a railroad company to “intersect, join and unite its railroad with any other railroad” upon the property of the company owning the latter railroad, and requiring such company “to grant the facilities” needed for the purpose, is an interest in lands which can only be

Consolidation Act (8 and 9 Vict. ch. 20), it has been held that one railroad company may make a contract with another for the use of its line and may pay tolls sufficient to make dividends upon the preference stock of the latter. *South Yorkshire R., etc. Co. v. Great Northern R. Co.*, 9 Exch. 55 (1853). *Contra*, *Simpson v. Denison*, 10 Hare, 51 (1852); *Compare* *Green Bay, etc. R. Co. v. Union Steamboat Co.*, 107 U. S. 98 (1882), (2 Sup. Ct. Rep. 221).

In *Charlton v. Newcastle, etc. R. Co.*, 5 Jur. (N. S.) 1096 (1859), a contract for the joint use of railroads and division of profits, antecedent to an amalgamation, was declared *ultra vires* and void.

¹ *Nangatuck R. Co. v. Waterbury*

Button Co., 24 Conn. 482 (1856); *London, etc. R. Co. v. London, etc. R. Co.*, 4 De G. & J. 362 (1859); *Simpson v. Denison*, 10 Hare, 51 (1852); *Ohio, etc. R. Co. v. Indianapolis, etc. R. Co.*, 5 Am. L. Reg. (N. S.) 733 (1866).

² *Midland R. Co. v. Great Western R. Co.*, L. R. 8 Ch. App. 841 (1873); *Great Northern R. Co. v. Manchester, etc. R. Co.*, 5 De Gex & Sm. 138 (1851).

³ *Elkins v. Camden, etc. R. Co.*, 36 N. J. Eq. 241 (1882). See also *Nashua, etc. R. Co. v. Boston, etc. R. Co.*, 27 Fed. 821 (1886), *reversed* on other grounds, 136 U. S. 356 (1890), (10 Sup. Ct. Rep. 1004).

⁴ *Union Pacific R. Co. v. Chicago, etc. R. Co.*, 163 U. S. 564 (1895), (16 Sup. Ct. Rep. 1173).

created by a written instrument.¹ It may well be doubted, however, upon principle, whether a mere trackage contract — independent of any statute and running for less than a year — comes within the Statute of Frauds.²

§ 258. **Assignability of Trackage Contracts.** — A trackage contract, upon consideration, while partaking of the nature of a license, is, essentially, a valid and enforceable contract between the parties.³

It is, however, a license in the sense that it confers a personal privilege. A railroad company in letting another corporation into the use of its tracks agrees only that that particular corporation may exercise the privilege. A trackage contract creates no transferable interest, and, without a stipulation to that effect, is not assignable.⁴

¹ *Port Jervis, etc. R. Co. v. New York, etc. R. Co.*, 132 N. Y. 439 (1892), (30 N. E. Rep. 855, 52 Am. & Eng. R. Cas. 107).

² Where an oral agreement for trackage rights has been executed an action will lie for use and occupation.

South Carolina Terminal Co. v. South Carolina, etc. R. Co., 52 S. C. 1 (1898), (29 S. E. Rep. 565).

³ *Louisville, etc. R. Co. v. Kentucky, etc. R. Co.*, 95 Ky. 550 (1894), (26 S. W. Rep. 532).

⁴ *Coney Island, etc. R. Co. v. Brooklyn Cable Co.* 53 Hun (N. Y.), 171 (1889), (6 N. Y. Supp. 108): "The question is not whether a corporation can sell or assign its franchises, but whether the agreement in question became vested in the defendant so that it can enforce it against the plaintiff. . . . This agreement was not a lease, and is, therefore, not a subject of subletting to different parties to be conjointly used with the original parties."

South Side, etc. R. Co. v. Second Avenue R. Co., 191 Pa. St. 509 (1899), (43 Atl. Rep. 346): "The Pittsburgh and Birmingham Company was the owner of the tracks (*de facto* at least for a term of years) and the Second Avenue Passenger Railway Company was a licensee, or at most a sub-lessee.

The latter had no rights but those the agreement gave it, the former had all the rights of ownership that the agreement did not part with. This is explicitly recognized in the provision that if it should allow any other company as licensee to use its tracks a proportionate credit should be allowed the Second Avenue company. The allowance of another company to come in as a licensee was by virtue of the rights of ownership. The latter company had no such rights, and could not divide or share or part with its privileges, except to an assignee within the terms of the agreement."

Under a contract for the use of terminal facilities, tracks, etc., by one railroad company with another, containing a provision that the grantee should not, by any contract with any other railroad corporation, give to such corporation the right for its trains to pass over or use the railroad of the grantor without its consent, it was held that the right to use such tracks, etc., did not pass to the successors or assigns of the grantee without the consent of the grantor under the provisions of the contract. *Terre Haute, etc. R. Co. v. Peoria, etc. R. Co.*, 61 Ill. App. 405 (1895).

Where a trackage contract, in terms, runs to the assignees of the parties, and

§ 259. **Construction of Trackage Contracts.** — The term of a trackage contract is fixed by the stipulations therein. When no time is stated it seems clear, as a general rule, that the contract is terminable at the option of either party after reasonable notice. An intention to make a perpetual arrangement should be clearly expressed.¹

In an English case, however, it was held that an agreement between two railway companies wherein one was granted running powers and the other certain facilities for making shipments, and containing mutual stipulations as to the shipment of goods over each other's lines, but not containing any provision as to the time for which it should endure, was a permanent and not a terminable contract, and that a notice to terminate was invalid.² But as this contract was authorized

both parties recognize another company as the successor in interest of one of them, "a court of equity will treat the assignee in fact as the legal assignee, possessed of the rights and charged with the obligations of the original party to the contract." *Chicago, etc. R. Co. v. Denver, etc. R. Co.*, 143 U. S. 608 (1891), (12 Sup. Ct. Rep. 479), *affirming* 45 Fed. 304 (1891), s. c. 46 Fed. 145 (1890).

¹ In *Boston, etc. R. Co. v. Boston, etc. R. Co.*, 5 Cush. (Mass.) 375 (1850), it was held that the right granted by the legislature to one railroad company to use the tracks of another did not become, upon its exercise, a permanent contract between the corporations, for such use, perpetual in its character, but that "it was rather in the nature of a lease for an indefinite period of time, with liability to pay as long as it might be used." It was also held that no perpetual obligation to use the tracks could be inferred from an obligation imposed upon the proprietary company to make expensive and permanent additions to its property to accommodate such use. See also *Canal, etc. R. Co. v. St. Charles Street R. Co.*, 44 La. Ann. 1069 (1892), (11 So. Rep. 702).

A trackage contract is not invalid because, within its prescribed duration,

the charter of one of the companies expires by limitation, provision being made in the contract for such contingency. *Union Pacific R. Co. v. Chicago, etc. R. Co.*, 163 U. S. 592 (1895), (16 Sup. Ct. Rep. 1173).

² *Llanelly, etc. R. Co. v. London, etc. R. Co.*, L. R. 7 H. L. Cas. 550 (1875), (45 L. J. Ch. D. 539, 23 W. R. 927, 32 L. T. 575). In this case Lord Cairns compared trackage contracts with contracts of partnership and of hiring and service in respect to their terminable nature (p. 559): "Reference was made to the well-known cases of contracts of hiring and service and contracts of partnership. These cases appear to me to have no analogy whatever to the present. With regard to contracts of hiring and service, assigning to each of them certain notices by which they can be terminated; and they are, besides, engagements which depend upon the personal confidence which one of the parties reposes in the other and which in their nature cannot be supposed to be of a perpetual character. With regard to contracts of partnership they also are already ruled and settled, by law, to be capable of termination at any moment unless a definite limit is prescribed upon the face of them. And, the law being well settled, when you

by the Railway Clauses Act, under which, in case any differences arose in its working, they might be made the subject of arbitration, the decision cannot be considered of general application.

Where one railroad company grants to another the right to use a portion of its line, it necessarily undertakes to furnish those facilities necessary to the exercise of the privilege granted. Thus, in an English case, where one railroad company had acquired running powers over the line of another and had equipped it with the block signal system, it was held that the latter company was bound to work the system — that it was a reasonable facility which the company was bound to afford.¹

Where two railroad companies entered into a contract wherein the use of certain tracks and terminal facilities was granted, it was held that the expenses necessary to such use, and the exercise of such facilities, must be borne entirely by the grantor company.²

The rights of the parties, under a trackage contract, are

have a contract of that kind, you apply the understood law, and you hold that the parties knowing what the law was, must be supposed to have intended to enter into a partnership which could at any time be terminated if they did not provide upon the face of their contract that it should be a continuing partnership."

In *Railway Co. v. Neel*, 56 Ark. 279 (1892), (19 S. W. Rep. 963), a trackage contract was held not to constitute a partnership between the railroad companies, and not to make one company the agent of the other for the purpose of receiving freight. The Court said (p. 287): "The contract between the two railway companies did not constitute a partnership between them nor did it make the Swan Lake railroad the agent of the appellant company for the purpose of receiving freight for and on its behalf. . . . The contract plainly intended to confer a license upon the Swan Lake railroad to run its trains

over the appellant company's track between Rob Roy and Pine Bluff. It created no other right, unless it was to limit the appellant's rights to make certain charges for freight and passengers."

¹ *Great Western R. Co. v. Bristol Port R., etc. Co.*, 5 Ry. & C. T. Cases, 94 (1885).

² *Elmira Rolling Mill Co. v. Erie R. Co.*, 28 N. J. Eq. 400 (1877), (14 Am. Ry. Rep. 199).

A contract by which one company granted to another a running privilege into a city provided for the payment of a certain sum for each car drawn over the first company's track, "excepting only empty freight cars and such loaded freight cars as . . . are hauled over said first party's line of railroad." *Held*, that the exemption was not ambiguous, and that the first clause covered all freight cars. *Louisville, etc. Co. v. Louisville S. R. Co.*, 100 Ky. 690 (1897), (39 S. W. Rep. 42).

measured, with respect to the use of track, by the terms of the contract, and the provisions of the Interstate Commerce Act apply to the situation and cannot authorize a different use of the track.¹

A stipulation in a contract between three railroad companies respecting the use of a common yard that the "necessary expenses" should be equally shared among them, did not include the extraordinary expense of a judgment obtained against one of the companies for injuries sustained by an employee, through its negligence.² But, under an agreement between the parties to such a contract that the cost of maintaining the tracks jointly used should be jointly borne, it was held that damages paid to employees, injured while engaged in the work of maintenance, were a part of the cost of maintenance and properly chargeable to the joint account.³

A provision in a trackage contract between two street railroad companies that, in case the licensee company should use steam as a motive power, either party might terminate the contract upon six months' notice was held not to authorize such termination upon the ground that the licensee had installed an electrical system.⁴

¹ The duty of a railroad company, operating its own road, to serve the local stations on its lines, does not apply to a company that has only a running privilege for through trains over a part of the road of another company which it does not control. In such a case the company is not required to disregard the conditions of its agreement, and does not violate the provisions of the Interstate Commerce Act by not receiving and discharging traffic on the tracks of the proprietary company. *Alford v. Chicago, etc. R. Co.*, 2 Int. Com. Rep. 771 (1890).

² *Gulf, etc. R. Co. v. Galveston, etc. R. Co.*, 83 Tex. 509 (1892), (18 S. W. Rep. 956, 52 Am. & Eng. R. Cas. 99).

Under a contract by a city with a railroad company by which it permits the company to construct a track through its streets, on condition that

the company permit other railroad companies to use the track, on paying a *pro rata* share of the cost of construction, without placing any limit on the time when other roads may come in, or their number, a delay in making application of nine years after its completion, during which two other roads have come in, is no ground for excluding an applicant. *Louisville, etc. R. Co. v. Mississippi, etc. R. Co.*, 92 Tenn. 681 (1893), (22 S. W. Rep. 920).

³ *Louisville, etc. R. Co. v. Chesapeake, etc. R. Co.*, 21 Ky. Law Rep. 875 (1899), (53 S. W. Rep. 277).

⁴ *Prospect Park, etc. R. Co. v. Coney Island, etc. R. Co.*, 144 N. Y. 152 (1894), (39 N. E. Rep. 17).

As to construction of a trackage contract in view of consolidation—whether it extends to subsequently acquired lines, see *Lancashire, etc. R.*

§ 260. **Specific Performance of Trackage Contracts.** — Trackage contracts are of such a nature that, as a general rule, a judgment for damages would furnish an inadequate remedy for their breach. When such a contract is not unconscionable or inequitable and the company seeking its enforcement has acted in good faith, a court of equity will decree its specific performance. It is not an objection to such a decree that it involves continuous acts and constant supervision. The court will adapt the remedy to the wrong.¹

In *Union Pacific R. Co. v. Chicago, etc. R. Co.*² Mr. Chief Justice Fuller said: "The jurisdiction of courts of equity to decree the specific performance of agreements is of a very ancient date, and rests on the ground of the inadequacy and incompleteness of the remedy at law. Its exercise prevents the intolerable travesty of justice involved in permitting parties to refuse performance of their contracts at pleasure by electing to pay damages for the breach. It is not contended that multiplicity of suits to recover damages for the refusal of defendants to perform would afford adequate relief, nor could it be, for such a remedy, under the circumstances, would neither be plain nor complete, nor a sufficient substitute for the remedy in equity, nor would the interests of the public be subserved thereby. But it is objected that equity will not decree specific performance of a contract requiring continuous acts involving skill, judgment and technical knowledge, nor enforce agreements to arbitrate, and that this case occupies that attitude. We do not think so. The decree is complete in itself, is self-

Co. v. East Lancashire, etc. R. Co., 5 H. L. Cas. 792 (1856), (2 Jur. (n. s.) 767, 25 L. J. Ex. 278).

¹ *United States: Union Pacific R. Co. v. Chicago, etc. R. Co.*, 163 U. S. 564 (1895), (16 Sup. Ct. Rep. 1173), *affirming* 51 Fed. 309 (1892); s. c. 47 Fed. 15 (1891); *Joy v. City of St. Louis*, 138 U. S. 1 (1891), (11 Sup. Ct. Rep. 243); *affirming* s. c. *sub nom.* *Central Trust Co. v. Wabash, etc. R. Co.*, 29 Fed. 546 (1886); *Railroad Co. v. Alling*, 99 U. S. 463 (1878).

Alabama: South, etc. R. Co. v. High-

land, etc. R. Co., 98 Ala. 400 (1893), (13 So. Rep. 682).

New York: Prospect Park, etc. R. Co. v. Coney Island, etc. R. Co., 144 N. Y. 152 (1894), (39 N. E. Rep. 17); *Lawrence v. Saratoga Lake R. Co.*, 36 Hun, 467 (1885).

England: Wolverhampton, etc. R. Co. v. London, etc. R. Co., L. R. 16 Eq. 433 (1873).

² *Union Pacific R. Co. v. Chicago, etc. R. Co.*, 163 U. S. 600 (1895), (16 Sup. Ct. Rep. 1173).

operating and self-executing, and the provision for referees in certain contingencies is a mere matter of detail and not of the essence of the contract. It must not be forgotten that, in the increasing complexities of modern business relations, equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them. As has been well said, equity has contrived its remedies 'so that they shall correspond both to the primary right of the injured party, and to the wrong by which that right has been violated;' and 'has always preserved the elements of flexibility and expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition in which new primary rights and duties are constantly arising and new kinds of wrongs are constantly committed.'"¹

§ 261. **Liability of Proprietary Company to Third Persons.** — Upon the principle that a corporation owing duties to the public cannot shift the responsibility for their performance without the consent of the State, a railroad company, permitting another company to use its tracks, remains liable for injuries to third persons — passengers, travellers at crossings and others — caused by the negligence of employees of the latter company in running its trains, to the same extent as if they were its own employees upon its own trains. The negligence of the licensee company is the negligence of the proprietary company.²

¹ Pom. Eq. Jur. § 111.

² *Georgia*: *Central R., etc. Co. v. Perry*, 58 Ga. 461 (1877).

Illinois: *Pennsylvania Co. v. Ellett*, 132 Ill. 654 (1890), (24 N. E. Rep. 559); *Peoria, etc. R. Co. v. Lane*, 83 Ill. 448 (1876); *Toledo, etc. R. Co. v. Rumbold*, 40 Ill. 143 (1866); *Pennsylvania R. Co. v. Greso*, 79 Ill. App. 127 (1898); *Cleveland, etc. R. Co. v. Bender*, 69 Ill. App. 262 (1896).

In *Pittsburgh, etc. R. Co. v. Campbell*, 86 Ill. 443 (1877), the lessee of a railroad, who, by contract, permitted another company to use its road, was

held liable for the negligence of the latter company.

Indiana: *Indianapolis, etc. R. Co. v. Solomon*, 23 Ind. 534 (1864).

Minnesota: *Heron v. St. Paul, etc. R. Co.*, 68 Minn. 542 (1897), (71 N. W. Rep. 706).

Missouri: *Sinclair v. Missouri, etc. R. Co.*, 70 Mo. App. 588 (1897).

New York: *Compare Cain v. Syracuse, etc. R. Co.*, 20 Misc. 459 (1897), (45 N. Y. Supp. 538), *affirmed* 27 App. Div. 376 (1898), (50 N. Y. Supp. 1).

North Carolina: *Aycock v. Railroad Co.*, 89 N. C. 321 (1883). *Compare Sel-*

In *Pennsylvania Co. v. Ellett*¹ the Supreme Court of Illinois said: "The law has become settled in this State, by an unbroken line of decisions, that the grant of a franchise, giving the right to build, own and operate a railway, carries with it the duty to so use the property and manage and control the railroad as to do no unnecessary damage to the person or property of others; and where injury results from the negligent or unlawful operation of the railroad, whether by the corporation to which the franchise is granted, or by another corporation, or by individuals whom the owner authorizes or permits to use its tracks, the company owning the railway and franchise will be liable. . . . The public may look for indemnity for injury resulting from the wrongful or unlawful operation of the road, to that corporation to which they have granted the franchise, and thus delegated a portion of the public service; and for this purpose the company whom it permits to use its tracks, and its servants and employees, will be regarded as the servants and agents of the owner company."²

§ 262. **Liability of Licensee Company to Third Persons.** — A railroad company operating trains upon the tracks of another company under a trackage contract is liable for its own negligence.³ Its responsibility for its acts and omissions is not

lars v. Richmond, etc. R. Co., 94 N. C. 654 (1886), (25 Am. & Eng. R. Cas. 451) — a case in which a correct result is reached through a manifestly erroneous course of reasoning.

England: In England as railway companies are compelled to grant running powers to other companies, an absolute liability for the negligence of the working company is manifestly inequitable. The rule of liability there is: The proprietary company is *prima facie* liable for injuries received upon its lines, but is entitled to show that the injury was caused by the negligence of another company in violation of the latter's agreement to provide for the safety of its trains. *Ayles v. South Eastern R. Co.*, L. R. 3 Ex. 146 (1868), (37 L. J. Ex. 104).

¹ *Pennsylvania Co. v. Ellett*, 132 Ill. 659 (1890), (24 N. E. Rep. 559).

² The fact that a railroad company grants to another company a right to use its tracks does not furnish an owner of land over which the proprietary company has acquired a right of way, any ground for claiming additional damages. *Miller v. Green Bay, etc. R. Co.*, 59 Minn. 169 (1894), (60 N. W. Rep. 1006).

³ *Illinois: Pennsylvania Co. v. Ellett*, 132 Ill. 654 (1890), (24 N. E. Rep. 559); *Wabash, etc. R. Co. v. Peyton*, 106 Ill. 534 (1883); *Peoria, etc. R. Co. v. Lane*, 83 Ill. 448 (1876); *Toledo, etc. R. Co. v. Rumbold*, 40 Ill. 143 (1866); *St. Louis, etc. R. Co. v. Rowley*, 90 Ill. App. 653 (1900); *Pennsylvania R. Co. v. Greso*, 79 Ill. App. 127 (1898); *Cleveland, etc. R. Co. v. Bender*, 69 Ill. App. 262 (1896).

The fact that the company owning a railroad track upon which a collision

affected by the fact that the proprietary company is also liable.

A licensee railroad company is liable for something more than the negligence of its own employees. When it obtains the right to run its trains over the tracks of another company it makes the tracks so used its own, to the extent that it is responsible, to persons injured upon or by its trains, for any failure to maintain the tracks in a safe condition.¹ It is likewise liable to persons so injured for the negligence of the employees of the proprietary company in the operation of that portion of the road over which it has running privileges. To that extent they become its employees.²

occurred was also negligent, does not excuse the negligence of another company using such track under an agreement with the owner. *Chicago, etc. R. Co. v. Mitchell*, 70 Ill. App. 188 (1897).

Indiana: *Cleveland, etc. R. Co. v. Berry*, 152 Ind. 607 (1899), (53 N. E. Rep. 415); *Pittsburgh, etc. R. Co. v. Thompson*, 21 Ind. App. 355 (1898), (50 N. E. Rep. 828). Compare *Cincinnati, etc. R. Co. v. Paskins*, 36 Ind. 380 (1871), (5 Am. Ry. Rep. 570); *Cincinnati, etc. R. Co. v. Townsend*, 39 Ind. 38 (1872).

Kansas: *Chicago, etc. R. Co. v. Posten*, 59 Kan. 449 (1898), (53 Pac. Rep. 465); *Chicago, etc. R. Co. v. Martin*, 59 Kan. 437 (1898), (53 Pac. Rep. 461); *Chicago, etc. R. Co. v. Groves*, 56 Kan. 601 (1896), (44 Pac. Rep. 628).

Missouri: *Sinclair v. Missouri, etc. R. Co.*, 70 Mo. App. 588 (1897).

New York: *McGrath v. New York Central, etc. R. Co.*, 63 N. Y. 522 (1876); *Leonard v. New York Central, etc. R. Co.*, 10 J. & S. (Sup. Ct.) 225 (1877).

¹ Where a railroad company procures, by contract with another company, the right of running its trains into and out of a depot over the track of the latter, it thereby makes that portion of the track so used its own, in so far that it will be responsible for all injuries resulting from negligence in

keeping or permitting it to be in an unsafe condition. *Wabash, etc. R. Co. v. Peyton*, 106 Ill. 534 (1883).

In *St. Louis, etc. R. Co. v. Rowley*, 90 Ill. App. 656 (1900), the Court said: "The right of way of the track upon which plaintiff in error's train was running, belonged to the C. P. & St. L. Ry. Co., which company managed and cared for it, the defendant in error paying for using the rails upon a wheelage basis. This fact would not, however, excuse defendant in error for damages caused by the condition of the right of way. When it, as a common carrier, used the tracks upon such right of way, it became liable for damages caused by its improper condition to the same extent as if it owned or leased it." *Semble* that a licensee company is liable for damages occasioned by a failure to maintain fences, *Toledo, etc. R. Co. v. Rumbold*, 40 Ill. 143 (1866). And see *Pittsburgh, etc. R. Co. v. Thompson*, 21 Ind. App. 355 (1898), (50 N. E. Rep. 828) (under the *Indiana* Statute). See also *Sinclair v. Missouri, etc. R. Co.*, 70 Mo. App. 588 (1897).

² In *Leonard v. New York Central, etc. R. Co.*, 10 J. & S. 233 (1877), the New York Supreme Court said: "When various companies run trains over the same road in a large city intersected by the crossings of streets, the protection of citizens in the use of the streets

The rule of liability is, clearly, that a railroad company, operating under a trackage contract, is liable to a passenger, or person lawfully upon the tracks, injured by its trains, to the same extent as if it owned the road.

§ 263. **Liability to Employees.** — Where one railroad company has the right, under a trackage contract, to run its trains over the track of another company, the latter company is liable to employees of the former company for injuries occasioned by the negligence of its switchmen and employees engaged in the work of maintaining and protecting the tracks.¹ The proprietary company, under a trackage contract, is bound to furnish a safe track for the trains of the licensee and is responsible to employees of the licensee for any injuries caused by defects in the tracks or roadbed.²

should not depend upon inquiries to be made of the signalling flagmen of the road, as to which company employs them, or whether they were duly authorized to signal danger or safety as this or that train passes. It must be assumed in such exigencies, that when a company chooses to run trains over a road guarded by flagmen that it elects to be protected by these flagmen properly discharging their duties, and to be made liable in case they neglect them. . . . The law does not give immunity from liability to a company operating its trains negligently, because it appears that it operates them upon a road and with a signal service that belongs to another company. As far as the person injured in passing over the crossing by such company's train is concerned, it is immaterial to whom the road or its signal service or its other appurtenances belong that are in use at the crossing. The duty primarily devolves upon the company running the train, that there shall be no negligence in respect to these matters as far as persons crossing are affected."

See also *McGrath v. New York Central, etc. R. Co.*, 63 N. Y. 522 (1876); *Chicago, etc. R. Co. v. Posten*, 59 Kan. 449 (1898), (53 Pac. Rep. 465); *Wabash,*

etc. R. Co. v. Peyton, 106 Ill. 534 (1883); *Pennsylvania R. Co. v. Greso*, 79 Ill. App. 127 (1898).

A railroad company using the tracks of another company is liable for the negligence of its employees, although they operate the train under the orders of the other company. *Chicago, etc. R. Co. v. Martin*, 59 Kan. 437 (1898), (53 Pac. Rep. 461). See also *Chicago, etc. R. Co. v. Groves*, 56 Kan. 601 (1896), (44 Pac. Rep. 628).

In *Patterson v. Wabash, etc. R. Co.*, 54 Mich. 91 (1884), (19 N. W. Rep. 761, 18 Am. & Eng. R. Cas. 130), a passenger recovered judgment against the corporation with which he had contractual relations for injuries caused by the negligence of a corporation using, in common with it, tracks of a third corporation.

¹ *Merrill v. Railroad Co.*, 54 Vt. 200 (1881).

² *Killian v. Augusta, etc. R. Co.*, 79 Ga. 234 (1867), (4 S. E. Rep. 165).

In *Clark v. Chicago, etc. R. Co.*, 92 Ill. 43 (1879), the Court held that an employee of a proprietary company, injured through the negligence of employees of a licensee company, in violating the rules of the proprietary company, could not recover damages from the proprietary company — the acci-

The licensee is, of course, liable to its own employees for any defects in its engines and cars.

Where several railroad companies have running privileges over the tracks of another company, the proprietary company is not liable to employees of one licensee company for injuries received through the negligence of employees of another licensee company. Redress for such injuries must be furnished by the corporation whose employees are at fault.¹

dent arising from a peril of the service
of which the employee had knowledge,
and not from any negligence of the
proprietary company.

¹ Georgia R., etc. Co. v. Friddell,
79 Ga. 234 (1887), (7 S. E. Rep. 214).

PART IV.

CORPORATE STOCKHOLDING AND CONTROL

CHAPTER XXV.

POWER OF CORPORATION TO HOLD STOCK IN OTHER CORPORATIONS.

I. *Rule that Statutory Authority is essential.*

- § 264. Necessity for Statutory Authority to purchase Stock. Rule in United States.
- § 265. Necessity for Statutory Authority to purchase Stock. Rule in England.
- § 266. Necessity for Statutory Authority to subscribe for Stock.
- § 267. Subscriptions or Purchases through Trustees or Agents.
- § 268. Similar Nature of Corporations does not affect Application of Rule.
- § 269. Expediency of Purchase of Stock immaterial.
- § 270. Assumption of Power to hold Stock in Articles of Association.

II. *Express Power to acquire Stock.*

- § 271. Corporations may acquire Stock in other Corporations when authorized. Statutory Provisions.
- § 272. Power to subscribe for Stock in Foreign Corporations.
- § 273. Construction of Statutes.
- § 274. Construction of Constitutional Prohibitions.

III. *Incidental Power to acquire Stock.*

- § 275. In General.
- § 276. Incidental Power to make Investments in Stocks.
- § 277. Incidental Power to take Stock in Satisfaction of Debt.
- § 278. Incidental Power to take Stock as Collateral.
- § 279. Incidental Power to acquire Stock in Connection with Consolidation or Purchase.
- § 280. Incidental Power to take Stock upon a Reorganization.
- § 281. Incidental power to take Stock in Exchange for Corporate Assets.
- § 282. Miscellaneous Instances of Incidental Power to acquire Stock.
- § 283. Presumption of Power to hold Stock.

I. *Rule that Statutory Authority is essential.*

- § 264. Necessity for Statutory Authority to purchase Stock. Rule in United States. — The charter of a corporation is the measure of its powers. It can exercise only such powers as

are conferred upon it, either in express terms or by necessary implication, in the law of its creation.¹

The purchase of stock in another corporation involves a participation in a new and distinct enterprise. A corporation can make such a purchase only when expressly authorized to do so by statute, or when the power can be implied as incidental to the powers specifically granted.²

¹ Chief Justice Marshall in the *Dartmouth College Case* (*Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 636 (1819)) said: "A corporation . . . being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence."

For cases stating this elementary principle as applicable to the power to purchase shares, see *People v. Chicago Gas Trust Co.*, 130 Ill. 268 (1889), (22 N. E. Rep. 798, 17 Am. St. Rep. 319); *Franklin Co. v. Lewiston Savings Inst.*, 68 Me. 431 (1877), (28 Am. Rep. 9).

² *United States: De la Vergne Co. v. German Savings Inst.*, 175 U. S. 40 (1899), (20 Sup. Ct. Rep. 20); *California Bank v. Kennedy*, 167 U. S. 362 (1897), (17 Sup. Ct. Rep. 831); *Louisville, etc. R. Co. v. Kentucky*, 161 U. S. 698 (1896), (16 Sup. Ct. Rep. 714); *First Nat. Bank v. Nat. Exch. Bank*, 92 U. S. 122 (1875); *Citizens State Bank v. Hawkins*, 71 Fed. 369 (1896); *McCutcheon v. Merz Capsule Co.*, 71 Fed. 787 (1896); *Easun v. Buckeye Brewing Co.*, 51 Fed. 156 (1892); *Hamilton v. Savannah, etc. R. Co.*, 49 Fed. 412 (1892); *Mackintosh v. Flint, etc. R. Co.*, 34 Fed. 582 (1888); *Sumner v. Marcy*, 3 Wood & M. 105 (1847).

California: Knowles v. Sandercock, 107 Cal. 629 (1895), (40 Pac. Rep. 1047).

Connecticut: Byrne v. Schuyler Electric Mfg. Co., 65 Conn. 336 (1895), (31 Atl. Rep. 833).

Georgia: Central R. Co. v. Collins, 40 Ga. 582 (1869); *Hazlehurst v. Savannah, etc. R. Co.*, 43 Ga. 13 (1871).

Illinois: People v. Pullman Car Co., 175 Ill. 125 (1898), (51 N. E. Rep. 664); *People v. Chicago Gas Trust Co.*, 130 Ill. 268 (1889), (22 N. E. Rep. 798, 17 Am. St. Rep. 319); *Martin v. Ohio Stove Co.*, 78 Ill. App. 105 (1898).

Maine: Franklin Co. v. Lewiston Savings Inst., 68 Me. 43 (1877), (28 Am. Rep. 9): "In the United States, corporations cannot purchase, or hold, or deal in the stocks of other corporations, unless expressly authorized to do so by law." Quoting Green's *Brice's Ultra Vires* (2d. Am. Ed.), 91 note.

New Hampshire: Pearson v. Concord R. Corp., 62 N. H. 537 (1883).

New Jersey: Elkins v. Camden, etc. R. Co., 36 N. J. Eq. 5 (1882).

New York: Milbank v. New York, etc. R. Co., 64 How. Pr. 20 (1882); *Talnage v. Pell*, 7 N. Y. 328 (1852); *Nassau Bank v. Jones*, 95 N. Y. 115 (1884), (47 Am. Rep. 14).

Ohio: Franklin Bank v. Commercial Bank, 36 Ohio St. 354 (1881); *Columbus, etc. R. Co. v. Burke*, 19 Weekly Law Bull. 27 (1887).

Tennessee: Marble Co. v. Harvey, 92 Tenn. 115 (1892), (20 S. W. Rep. 427).

The rule that one corporation, without statutory authority, cannot purchase the stock of another, is manifestly inapplicable to stockholders in corporations. As said in *State v. Butler*, 86 Tenn. 627 (1888), (8 S. W. Rep. 586): "We know of no principle of law that would prevent the stockholders in an insurance company from becoming, at the same time, stockholders in a bank, even where the same stockholders own all the stock in the two corporations."

§ 265. **Necessity for Statutory Authority to purchase Stock. Rule in England.** — The rule that purchases by one corporation of stock in another, without legislative authority, are *ultra vires* has not been adopted to its fullest extent in England. The rule there seems to be that a strictly private corporation "may deal in the shares of other corporations, without express power so to do, provided the nature of its business be such as to render such transactions conducive to its prosperity."¹

With respect to railroad companies and other *quasi*-public corporations, however, the English courts strictly apply the American rule. Such corporations cannot, without statutory authority, purchase, take or deal in the stock of other corporations.²

¹ Green's Brice's *Ultra Vires* (2d Am. Ed.), 91.

The rule, however, seems by no means well settled, and is based, principally, upon *dicta* of the judges.

In re Barnard's Banking Co., L. R. 3 Ch. App. 105 (1867), Lord Cairns said: "There is no apparent or *prima facie* objection to a corporation so joining [by purchase of shares] with another corporation in trade. A trading corporation, as we well know, may enter into trade or partnership along with an individual. There is no reason at common law, so far as I know, why one corporation should not become a member of another corporate body." The real question at issue was, however, whether an *express* power to purchase shares was contrary to the statutes governing trading companies.

In *Royal Bank of India's Case*, L. R. 4 Ch. App. 257 (1869), Lord Selwyn, after approving the judgment of Lord Cairns in the above case, said: "Looking at the question as a mere abstract question, in my judgment there is nothing to prevent a corporation from being a shareholder in another trading corporation."

Lord Giffard said (p. 262): "I quite agree that the *Royal Bank of India* had no authority to speculate in shares, and

that if it had gone upon the *Stock Exchange* and bought shares as a speculation, such proceeding would have been *ultra vires*." In this case the transaction was a pledge, and the bank, under the American rule, had implied power to buy in the stock.

In re Financial Corporation, 28 W. R. 760 (1880), it was held that a corporation had power to purchase shares of other companies when it was organized for the purpose of "undertaking, assisting and participating, in financial, commercial and industrial operations . . . both singly, and in connection with other persons, firms, companies and corporations."

See also *Canada Life Assur. Co. v. Pell Mfg. Co.*, 26 Grants Ch. (Canada) 486 (1879). Compare *Joint Stock Discount Co. v. Brown*, L. R. 8 Eq. 381 (1869).

² In *Great Eastern R. Co. v. Turner*, L. R. 8 Ch. 152 (1872), Lord Selborne said: "There is no authority to purchase [shares in another corporation] either in the name of the company, or in the name of the chairman, or in any other name. The company is a mere abstraction of law. All that it does, all that the law imputes to it as its act, must be that which can legally be done within the powers vested in it

In Maryland, the English rule concerning private corporations has been adopted and applied to all corporations.¹

§ 266. **Necessity for Statutory Authority to subscribe for Stock.**—Statutes authorizing “persons” to accept a charter, or form a corporation under general laws, confer the privilege upon individuals and not upon corporations.² Upon this principle, and upon the general principle that the powers of a corporation are measured by the laws under which it is organized, it follows that a corporation, unless authorized by statute, cannot make a valid subscription to the capital stock of another corporation.³

by law. Consequently, a thing which is *ultra vires*, and unauthorized, is not an act of the company in such a sense as that the consent of the company to that act can be pleaded.”

In *Great Northern R. Co. v. Eastern Counties R. Co.*, 21 L. J. (Ch.) 840 (1851), one corporation desired to purchase stock in another, with the object of controlling the corporation. The Court said that it was an “attempt to carry into effect, without the intervention of Parliament, what cannot lawfully be done except by Parliament, in the exercise of its discretion with reference to the interest of the public.”

See also *Great Western R. Co. v. Metropolitan R. Co.*, 32 L. J. Ch. 382 (1863), 9 Jur. (n. s.) 562; *Maunsell v. Midland Great Western R. Co.*, 1 Hem & M. 130 (1863).

¹ In *Booth v. Robinson*, 55 Md. 419 (1880), it was held that one steam packet company might purchase the shares of another steam packet company. The Court said (p. 433), that, “having money to loan, or invest, there would appear to be no reason why it may not invest in stock of other corporations as well as in other funds, provided it be done *bona fide*, and with no sinister or unlawful purpose.” This decision is based upon the *dicta* in the English cases cited in note 1, p. 382 *supra*. See also *Davis v. United States Electric Power, etc. Co.*, 77 Md. 39 (1893), (25 Atl. Rep. 982). Also *Elysville Mfg.*

Co. v. Okisko Co., 1 Md. Ch. Dec. 392 (1849), *affirmed* 5 Md. 152 (1853).

² A corporation is not a “person” within the meaning of the Louisiana statute authorizing the formation of a corporation by any number of “persons” not less than six. *Factors, etc. Ins. Co. v. New Harbor Protection Co.*, 37 La. Ann. 233 (1885).

Under a Washington statute providing that two or more “persons” may form a corporation, it has been held that although another statute provides that “person” shall be construed to include a corporation, a corporation cannot become a subscriber to shares in another corporation. *Denny Hotel Co. v. Schram*, 6 Wash. 134 (1893), (32 Pac. Rep. 1002, 36 Am. St. Rep. 137). See also *Valley R. Co. v. Lake Erie Iron Co.*, 46 Ohio St. 44 (1888), (18 N. E. Rep. 486, 1 L. R. A. 412, 26 Am. & Eng. Corp. Cas. 56). See also *Lagrone v. Zimmerman*, 46 S. C. 372 (1895), 24 S. E. Rep. 290).

³ *United States: Pauly v. Coronado Beach Co.*, 56 Fed. 428 (1893).

Alabama: Lanier Lumber Co. v. Rees, 103 Ala. 622 (1893), (16 So. Rep. 637); *Commercial Fire Ins. Co. v. Montgomery County*, 99 Ala. 1 (1891), (14 So. Rep. 490, 42 Am. St. Rep. 17).

California: Knowles v. Sandercock, 107 Cal. 629 (1895), (40 Pac. Rep. 1047).

Connecticut: Mechanics Sav. Bank v. Meriden Agency Co., 24 Conn. 159 (1855).

Any such subscription made by a corporation, without statutory authority, is an *ultra vires* executory contract and is wholly void.¹ As said by the Supreme Court of Ohio in *Valley R. Co. v. Lake Erie Iron Co.*²: "We think it is well settled, as a result of the decisions in this State, as well as elsewhere, that an incorporated company cannot, unless authorized by statute, make a valid subscription to the capital stock of another; that such subscription is *ultra vires*, and void."

§ 267. **Subscriptions or Purchases through Trustees or Agents.**—The rule that one corporation cannot, without statutory authority, become an incorporator or stockholder in another cannot be evaded by subscriptions or purchases made by persons in their own names but in behalf of a corporation.³

Georgia: Military Interstate Ass'n v. Savannah, etc. R. Co., 105 Ga. 420 (1898), (31 S. E. Rep. 200).

Illinois: Peshtigo Co. v. Great Western Tel. Co., 50 Ill. App. 624 (1893).

Louisiana: New Orleans, etc. Steamship Co. v. Ocean Dry Dock Co., 28 La. Ann. 173 (1876), (26 Am. Rep. 90). See also *Factors, etc. Ins. Co. v. New Harbor Protection Co.*, 37 La. Ann. 233 (1885).

Missouri: Newland Hotel Co. v. Lowe Furniture Co., 73 Mo. App. 135 (1898).

New Jersey: Central R. Co. v. Pennsylvania R. Co., 31 N. J. Eq. 475 (1879).

New York: Berry v. Yates, 24 Barb. 199 (1857).

Ohio: Valley R. Co. v. Lake Erie Iron Co., 46 Ohio St. 44 (1888), (18 N. E. Rep. 486, 1 L. R. A. 412, 26 Am. & Eng. Corp. Cas. 56); *Smith v. Newark, etc. R. Co.*, 8 Ohio Cir. Ct. Rep. 583 (1894).

Pennsylvania: McMillan v. Carson Hill Union Min. Co., 12 Phila. 404 (1878).

Washington: Denny Hotel Co. v. Schram, 6 Wash. 134 (1893), (32 Pac. Rep. 1002, 36 Am. St. Rep. 137).

¹ In *Lanier Lumber Co. v. Rees*, 103 Ala. 627 (1893), (16 So. Rep. 637), the Court said: "It is equally clear,

upon principle and authority, that all such subscriptions, or contracts of subscription [for stock in other corporations], are not voidable, but utterly void."

See also *Peshtigo Co. v. Great Western Tel. Co.*, 50 Ill. App. 624 (1893); *Valley R. Co. v. Lake Erie Iron Co.*, 46 Ohio St. 44 (1888), (18 N. E. Rep. 486, 1 L. R. A. 412, 26 Am. & Eng. Corp. Cas. 56); *New Orleans, etc. Steamship Co. v. Ocean Dry Dock Co.*, 28 La. Ann. 173 (1876), (26 Am. Rep. 90); *Berry v. Yates*, 24 Barb. (N. Y.) 199 (1857).

² *Valley R. Co. v. Lake Erie Iron Co.*, 46 Ohio St. 49 (1888), (18 N. E. Rep. 486, 1 L. R. A. 412, 26 Am. & Eng. Corp. Cas. 56), *per Minshall, J.*

³ *Lanier Lumber Co. v. Rees*, 103 Ala. 627 (1893), (16 So. Rep. 637): "And it is too well settled to require discussion, that without such [statutory] authority one corporation cannot subscribe for, or invest its own capital in the shares of other corporations, either directly, as by becoming in its own name an incorporator of a new corporation, or indirectly, by subscriptions in the names of persons acting as agents and holding as trustees."

Martin v. Ohio Stove Co., 78 Ill. App. 108 (1898): "A corporation cannot become a stockholder in another

A corporation, cannot, by indirection, transcend its chartered powers.

In *Central R. Co. v. Pennsylvania R. Co.*, Chancellor Runyon said:¹ "A corporation cannot in its own name subscribe for stock, or be a corporator under the general railroad law; nor can it do so by a simulated compliance with the requirements of the law through its agents as pretended corporators and subscribers for stock."

§ 268. **Similar Nature of Corporations does not affect Application of Rule.**—The rule that corporations, in the absence of statutory authority, cannot acquire stock in other corporations, having its foundation in the limitations imposed upon corporate powers, is applicable both to corporations of a similar and a dissimilar nature.² A corporation has no more

corporation, especially when the object to be attained is the control of the latter. In the absence of express statutory authority, it cannot become an incorporator by subscribing for shares of a new corporation, and it cannot do this indirectly through persons acting as its agents or tools. . . . To permit the corporation, by its directors, to make the subscriptions in the individual names of the latter, thereby giving a semblance of compliance with the statute sufficient to secure the issuance of a certificate of incorporation, as was done in this case, and then by proceedings like the present, instituted by a person *in pari delicto*, compel the stockholders to transfer their shares to the corporation itself, would be to permit a person to take advantage of his own wrong to perpetuate a fraud upon the law, and to use a court of equity to aid in evading the law and setting it at naught."

See also *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq. 475 (1879); *Marble Co. v. Harvey*, 92 Tenn. 118 (1892), (20 S. W. Rep. 427); *Nassau Bank v. Jones*, 95 N. Y. 115 (1884); *Logan v. Courtown*, 12 Beav. 22 (1850).

¹ *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq. 494 (1879).

In *Tecumseh, etc. Bank v. Russell*,

50 Neb. 277 (1897), (69 N. W. Rep. 763), it was held that where the cashier of a bank uses its funds to pay for stock in another bank, courts will hold that such stock belongs to the former bank, except as against *bona fide* purchasers.

² I. CORPORATIONS OF SIMILAR NATURE.

A. Railroad Companies.

Central, etc. R. Co. v. Collins, 40 Ga. 636 (1869): "A railroad company, without express authority given by the legislature to make the purchase, cannot purchase stock in another railroad company." See also *Hazlehurst v. Savannah, etc. R. Co.*, 43 Ga. 13 (1871), holding that a railroad company cannot buy stock in another in order to influence its management. Also *Milbank v. New York, etc. R. Co.*, 64 How. Pr. (N. Y.) 20 (1882). *Pearson v. Concord R. Corp.*, 62 N. H. 537 (1883).

B. Gas Companies.

In *People v. Chicago Gas Trust Co.*, 130 Ill. 283 (1889), (22 N. E. Rep. 798), Judge Magruder said: "Where a charter, in express terms, confers upon a corporation the power to maintain and operate works for the manufacture and

power to purchase the stock of another corporation having a similar object to its own than it has to make such purchase

sale of gas, it is not a necessary implication therefrom that the power to purchase stock in other gas companies should also exist. There is no necessary connection between manufacturing gas and buying stocks. If the purpose for which a gas company has been created is to make and sell gas, and operate gas works, the purchase of stock in other gas companies is not necessary to accomplish such purpose. 'The right of a corporation to invest in shares of another company cannot be implied because both companies are engaged in a similar kind of business.'" (1 Morawitz Priv. Corp. § 431).

C. Mining Companies.

A corporation having the right to mine, in organizing another corporation for mining purposes, acts without the scope of its powers. *McMillan v. Carson Hill Union Min. Co.*, 12 Phila. (Pa.) 404 (1878).

D. Manufacturing Companies.

The purchase by a foreign manufacturing corporation of the stock of a domestic corporation for the purpose of controlling it, is *ultra vires*, though they are engaged in a similar business. *Marble, etc. Co. v. Harvey*, 92 Tenn. 115 (1892), (20 S. W. Rep. 427, 18 L. R. A. 252). See also *Byrne v. Schuyler Electric Mfg. Co.*, 65 Conn. 336 (1895), (31 Atl. Rep. 833); *McCutcheon v. Merz Capsule Co.*, 71 Fed. 787 (1896). Manufacturing Company cannot purchase stock in subsidiary manufacturing company. *People v. Pullman Car Co.*, 175 Ill. 125 (1898), (51 N. E. Rep. 664).

E. Insurance Companies.

Berry v. Yates, 24 Barb. (N. Y.) 199 (1857); *Pierson v. McCurdy*, 33 Hun (N. Y.), 520 (1884). *Ex parte British Nation, etc. Ass'n*, L. R. 8 Ch. 679 (1878).

F. Banks.

A national bank cannot hold stock in a savings bank not taken as security, or acquired in due course of business. *California Bank v. Kennedy*, 167 U. S. 362 (1897), (17 Sup. Ct. Rep. 831).

II. CORPORATIONS OF DIFFERENT NATURE.

(a) Bank cannot hold stock of railroad Company: *Nassau Bank v. Jones*, 95 N. Y. 1 (1884); nor of insurance company: *Bank of Commerce v. Hart*, 37 Neb. 197 (1893), (55 N. W. Rep. 631); nor of manufacturing company: *Franklin Co. v. Lewiston Sav. Inst.*, 68 Me. 43 (1877), (28 Am. Rep. 9).

(b) Insurance company cannot hold stock in bank. *Commercial Fire Ins. Co. v. Montgomery County*, 99 Ala. 1 (1892), (14 So. Rep. 498); *State v. Butler*, 86 Tenn. 614 (1888), (8 S. W. Rep. 586).

(c) Manufacturing company cannot subscribe for or purchase stock of bank. *Summer v. Marcy*, 3 Woodb. & Minot (U. S.), 105 (1848); nor of railroad company: *Valley R. Co. v. Lake Erie Iron Co.*, 46 Ohio St. 44 (1888), (18 N. E. Rep. 486, 1 L. R. A. 412, 26 Am. & Eng. Corp. Cas. 56).

(d) Note-selling company cannot hold stock in bank. *Joint Stock Discount Co. v. Brown*, L. R. 8 Eq. 381 (1869).

(e) Railroad company cannot purchase stock of mining company. *Columbus, etc. R. Co. v. Burke*, 19 Ohio Week. Law Bull. 27 (1887).

(f) Furniture company cannot subscribe for stock in hotel company. *Knowles v. Sandercock*, 107 Cal. 629 (1895), (40 Pac. Rep. 1047); *Newland Hotel Co. v. Lowe Furniture Co.*, 73 Mo. App. 135 (1898).

(g) Dry dock company cannot subscribe for stock of steamship company. *New Orleans, etc. S. Co. v. Ocean Dry*

in the case of a corporation formed for an entirely different purpose.

The underlying principle, however, is not precisely the same in both cases. A corporation cannot acquire stock in another corporation organized for similar purposes, because it must manage its funds directly through its own officers, and not indirectly by becoming a stockholder in another corporation. A corporation cannot purchase stock in another corporation created for the accomplishment of essentially different objects, not only for the reason just stated, but, primarily, because it cannot invest its funds and engage in a business entirely foreign to the purposes for which it was created. "Were this not so," said the Supreme Court of Ohio in *Franklin Bank v. Commercial Bank*,¹ "one corporation by buying up the majority of the shares of the stock of another, could take the entire management of its business, however foreign such business might be to that which the corporation so purchasing said shares was created to carry on. A banking corporation could become the operator of a railroad, or carry on the business of manufacturing, and any other corporation could engage in banking by obtaining the control of the bank's stock."

§ 269. **Expediency of Purchase of Stock immaterial.** — The operation of the rule that a corporation, without statutory authority, cannot subscribe for or purchase stock in another corporation is in no way affected by the fact that such purchase or subscription may be of benefit to it. An *ultra vires* agreement is not made *intra vires* by being profitable. The contract of association cannot be enlarged to take in a new adventure because the transaction seems expedient.²

Dock Co., 28 La. Ann. 173 (1876), (26 Am. Rep. 90).

(h) Lumber company cannot subscribe for stock of telegraph company. *Peshtigo Co. v. Great Western Tel. Co.*, 50 Ill. App. 624 (1893).

(i) Land company has no authority to subscribe for stock of manufacturing company. *Pauly v. Coronado Beach Co.*, 56 Fed. 428 (1893).

¹ *Franklin Bank v. Commercial Bank*, 36 Ohio St. 355 (1881), (38 Am. Rep. 594).

² *Central, etc. R. Co. v. Collins*, 40 Ga. 582 (1869); *Valley R. Co. v. Lake Erie Iron Co.*, 46 Ohio St. 44 (1888), (18 N. E. Rep. 486 1 L. R. A. 412, 26 Am. & Eng. Corp. Cas. 56.)

In *Central, etc. R. Co. v. Collins*¹ the Supreme Court of Georgia said: "We do not think the profitableness of this contract, to the stockholders of the Central and Southwestern Railroad has anything to do with the matter. These stockholders have a *right*, at their pleasure, to stand on their contract. If the charters do not give to these companies the *right* to go into this new enterprise any one stockholder has a right to object. He is not to be forced into an enterprise not included in the charter. That it will be to his interest is no excuse; that is for him to judge."

§ 270. **Assumption of Power to hold Stock in Articles of Association.** — A stream can rise no higher than its source. The powers of corporations organized under general incorporation acts can be such only as are mentioned in those acts. The power to hold stock in other corporations exists only when granted by legislative authority. Unless such power is specifically conferred upon corporations formed under general laws, incorporators take nothing by assuming to themselves the power in their articles of association. Even the incidental powers of a corporation are not increased by such an assumption.²

In *People v. Chicago Gas Trust Co.*,³ Judge Magruder said: "To hold that they [the incorporators] could confer such power by writing it down in the statement would be to hold that the general assembly could clothe them with a part of its legislative functions."

II. *Express Power to acquire Stock.*

§ 271. **Corporations may acquire Stock in other Corporations when authorized. Statutory Provisions.** — The statutes of

¹ *Central, etc. R. Co. v. Collins*, 40 Ga. 617 (1869).

² *People v. Chicago Gas Trust Co.*, 130 Ill. 268 (1889), (22 N. E. Rep. 798, 17 Am. St. Rep. 319). Compare *Market St. R. Co. v. Hellman*, 109 Cal. 590 (1895), (42 Pac. Rep. 225).

Articles of association are construed strictly against the grantee and in favor of the public, and any provisions added

to the articles not authorized by the incorporation act are wholly void.

Oregon R., etc. Co. v. Oregonian R. Co., 130 U. S. 1 (1889), (9 Sup. Ct. Rep. 409); *Medical College Case*, 3 Whart. (Pa.) 445 (1838); *Eastern Plank R. Co. v. Vaughan*, 14 N. Y. 546 (1856); *Heck v. McEven*, 12 Lea (Tenn.), 97 (1883).

³ *People v. Chicago Gas Trust Co.*, 130 Ill. 287 (1889), (22 N. E. Rep. 798, 17 Am. St. Rep. 319).

the different States authorizing corporations to take stock in other corporations are collected in the foot-note.¹

¹ *Alabama.* Acts 1900-01, p. 530: "Any corporation . . . of any other State or Territory of the United States, or any foreign country, or territory, . . . is hereby authorized . . . to acquire, by subscription to the capital stock, or by purchase, or otherwise, and to hold, own and vote shares of the capital stock of any corporation . . . of the State of Alabama" — provided that such foreign corporation has power under its charter, etc., to acquire stock in other corporations.

Code 1896, § 1170 authorizes railroad companies to subscribe for stock in aid of construction of connecting roads.

Arizona. R. S. 1901, par. 864, p. 336: "Any railroad company now or hereafter existing under the laws of this Territory . . . may buy the stock and bonds . . . of any" foreign or domestic corporation.

Arkansas. Sand. & Hills' Digest, 1894, § 6321: "Any railroad company in this State . . . may buy . . . the stock . . . of any railroad company or companies incorporated or organized within or without this State whenever the roads of such companies shall form, in the operation thereof, a continuous line or lines."

Ib. § 6322: "Any railroad company . . . of any other State or Territory may . . . buy the stock . . . of any railroad company . . . of this State, whenever the roads of such companies shall form in the operation thereof a continuous line or lines." See also *ib.* § 6328.

Colorado. Session Laws 1899, ch. 125, p. 313: "Any railroad company . . . of this State may . . . acquire and may hold the . . . stock of other companies owning or operating any" railroad which shall connect with the "line of road which such company is . . . authorized to purchase, or which, under the laws of this State, it is authorized to lease, or . . . consolidate" with.

Connecticut. Pub. Acts, 1895, ch. 138: "Any corporation incorporated in

this State, and not prohibited by any provision in its own charter or by the general statutes of this State, may acquire, purchase, and hold the stock or securities of any other corporation incorporated by or doing business under the laws of this State; . . . The provisions of this act shall not apply to any savings bank, trust company or life insurance company."

G. S. 1888, § 3442: "No other railroad company shall subscribe for, take, or hold any stock or bonds of any railroad company established under the provisions of this chapter, either directly or indirectly, unless specially authorized by the General Assembly." As to appraisal and purchase of minority stock interests, see P. A. 1895, ch. 232, p. 576.

Delaware. Laws 1901, ch. 67, § 136, p. 352: "Any corporation . . . of this State . . . may . . . purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of, the shares of the capital stock of . . . any other corporation or corporations of this State, or any State, country, nation or government, and while owner of said stock may exercise all the rights, powers and privileges of ownership including the right to vote thereon."

Florida. R. S. 1891, § 2248: "Any railroad or canal company in this State shall have power . . . to purchase the stock . . . of any other company."

Georgia: For Georgia constitutional provision against corporate stockholding, see *ante*, § 32, note.

Idaho. R. S. § 2686 (as amended by Sess. Laws, 1899, p. 11): "Any railroad corporation, whether . . . of this State or of the Territory of Idaho, or of the United States, or of any other State or Territory, may take, purchase, hold, sell, and dispose of . . . the bonds and securities of any other railroad corporation whose line of railroad is continuous of or otherwise connected with its own."

The effect of these statutes is to enlarge the powers of the corporations to which they apply. There is nothing in the

Illinois. R. S. 1901, p. 494: "Any corporation . . . of this State for mining or manufacturing purposes . . . is hereby authorized to own and hold shares of the capital stock . . . of any railroad company or companies when such railroad or railroads shall connect the different plants of such mining and manufacturing companies with each other, or with the other railroad or harbors. Provided, that said mining or manufacturing companies shall not . . . hold stock in more than one railroad connecting the same points."

Indiana. Horner's Anno. Stat. 1901, § 4013: "Any railroad company in this State and organized under the . . . laws of this State" may "subscribe and take stock in any railroad bridge company on the route of said railroad or at the terminus of said railroad, for the use and benefit of said road."

For *Indiana* statutes relating especially to gas light and water works companies, see Stat. 1894, §§ 5059 and 5087.

Iowa. Code 1897, § 2047: "Any railway corporation . . . of this State, or operating a road therein, under the authority of the laws thereof, may acquire, own and hold either the whole or any part of the stock . . . of any other railroad company of this or any adjoining State."

Kansas. G. S. 1897, p. 747, § 34: "Any railroad company . . . of this State" may "purchase and hold the stock and bonds, or either, . . . of any other railroad company or companies, the line of whose railroad, constructed or being constructed, connects with its own." For other statutes conferring power upon railroad companies to purchase stocks, see *ib.* p. 751, § 51; p. 762, § 95. For statute authorizing corporations to become members of mutual fire insurance companies, see *ib.* ch. 74, § 133.

Kentucky. Stat. 1899, § 769: "Any railroad company . . . may, unless pro-

hibited by law, subscribe to the capital stock of any other railroad company . . . of this or any other State, with the assent of such company; and any company . . . of this or any other State may, unless prohibited by law, subscribe to the capital stock of any company . . . of this State with the assent of such company."

For special provisions concerning bridge companies, see *ib.* § 849.

Maine. Laws 1897, p. 219, ch. 186, § 1: "A railroad corporation, which has a lease of, or which operates the railroad of another railroad corporation, may purchase and hold shares of the capital stock of such corporation."

Ib. § 2: "A railroad corporation, which owns a majority of the capital stock of another railroad corporation, may purchase further shares of the capital stock of such corporation and hold the same together with the shares which it" now owns.

Maryland. Laws 1900, ch. 217, p. 321: "Any railroad company . . . of this State" may "acquire, own and hold, pledge, sell or otherwise dispose of . . . stocks, . . . of other railroad companies of this or any other State, and of any inland, coast or ocean transportation company or companies."

Gen. Laws 1888, Art. 23, § 203, authorizes railroad companies to purchase stock in steamship companies.

Massachusetts. Pub. Stat. 1882, ch. 112, § 74: "Except by special authority of the general court or as authorized in the following sections, no railroad corporation shall . . . subscribe for, take, or hold shares in the stock . . . of any other corporation or company."

Ib. § 75, authorizes a railroad company to hold stock to a limited amount in a telegraph company whose line connects two or more places on its railroad.

Ib. § 80, authorizes a railroad company to subscribe for a limited amount

nature of a corporation which renders it incapable of holding stock in other corporations and questions of public policy are determined by the legislature in granting the power.

of stock to aid in the construction of a branch or connecting railroad.

Ib. ch. 106, § 78, authorizes manufacturing companies under certain conditions to hold stock in gas companies.

Michigan. Comp. Laws 1897, § 6253: "Any railroad company organized under this act may . . . subscribe to the capital stock of any other company organized under this act with the assent of such other company; and any railroad company . . . of this State may subscribe to the capital stock of any company organized under this act" not having the same terminal points and not being a competing line, with the assent of the company for whose stock such subscription is made.

Ib. § 6327, authorizes a railroad company to aid in the construction of another railroad by subscribing for stock.

Ib. § 6691 (as amended by laws 1899, pp. 18-19), authorizes telephone and messenger service corporations to purchase stock in certain other corporations.

Ib. § 6474, authorizes the purchase of stock in stage companies.

Ib. § 7011, authorizes mining companies to subscribe for or purchase stock in companies furnishing transportation facilities to their mines, or power or light to be used in their works.

Ib. § 7012, authorizes mining companies conducting their business outside of Michigan to subscribe for and own stock in similar corporations, likewise doing business outside the State.

Ib. § 8516, authorizes the holding of stock in water companies.

Minnesota. G. S. 1894, § 2834: "Any [mining] corporation organized under this act may take, acquire and hold stock in any other corporation, if a majority in amount of the stockholders shall so elect."

Mississippi. Sess. Laws 1900, ch. 88, p. 125, § 5: "No corporation shall, directly or indirectly, purchase, or own the capital stock, or any part thereof, of any other corporation . . . if such other corporation be engaged in the same kind of business and be a competitor therein."

Missouri. R. S. 1899, § 1061: "Any railroad company . . . organized under the laws of this State . . . may acquire any line of railroad, within or without this State, which shall form a continuous line with the road operated by such company . . . and may acquire and may hold the obligations and stock of other companies owning or operating any such lines of road."

Ib. § 1060, authorizes subscriptions in aid of the construction of connecting lines.

Ib. § 1181, authorizes bridge companies to acquire stock in certain street railway companies.

Montana. Code 1895, § 912: "Any railroad corporation whose line is wholly or partly within this State, or reaches the boundary line thereof, . . . of Montana or of the United States, or of any other State or Territory, may take, purchase, hold, sell and dispose of, or guarantee the capital stock . . . of any other railroad corporation whose line of railroad within this State is continuous of or connects with its own line."

Ib. § 923, authorizes subscriptions and purchases of stock in aid of the construction of other railroads.

Sess. Laws 1899, p. 113, prescribe a method for authorizing, by a vote of two-thirds of the stock of the vendor corporation, the sale of corporate assets for stock in another corporation.

Nebraska. Comp. Stat. 1901, § 1769, authorizes a railroad company to aid in the construction of a connecting road by a subscription to its stock.

Nevada. Comp. Laws 1900, § 893,

It will be observed that the greater number of statutes apply only to railroad companies, and that these are limited

authorize corporations formed for "mining, milling or ore reduction purposes" to subscribe for stock in any corporation formed for the purpose of facilitating the developing or working of mines.

New Jersey. Stat. Rev. 1896, ch. 4, § 51: "Any corporation may purchase, hold, sell, assign, mortgage, pledge, or otherwise dispose of the shares of the capital stock of, or any bonds . . . created by any other corporation or corporations of this or any other State, and while owner of such stock may exercise all the rights, powers and privileges of ownership, including the right to vote thereon."

G. S. 1895, p. 963, § 260 (General Corporation Act): "Any corporation or corporations created under the provisions of the act to which this is a supplement" may "purchase, sell, assign, transfer, mortgage, pledge, or otherwise dispose of the shares of the capital stock of any other corporation or corporations created under the law of this or any other State, and" may "exercise, while owners of such stock, all the rights, powers and privileges, including the right to vote thereon, which natural persons, being the owners of such stock, might, could or would do."

Ib. § 345, p. 983: "It shall be lawful for any corporation of this State, or of any other State, doing business in this State and authorized by law to own and hold shares of stock . . . of corporations of other States, to own and hold and dispose thereof in the same manner and with all the rights, powers and privileges of individual owners of shares of the capital stock . . . of corporations of this State."

Ib. § 172, p. 942, authorizes subscriptions by land and seashore improvement companies in aid of the construction of certain railroads.

Ib. § 351, p. 986, authorizes certain land and improvement companies to purchase stock in similar corporations.

Stat. Rev. 1896, ch. 4, § 50, authorizes construction companies to hold stock in similar corporations.

New Mexico. Comp. Laws 1897, § 3891, authorizes railroad companies to subscribe for stock in aid of the construction of connecting roads.

New York. Laws 1890, ch. 564 (as amended to 1899), Art. 3, § 40 (Stock Corporation Law): ". . . Any stock corporation, domestic or foreign, except monied corporations, may purchase, acquire, hold and dispose of the stocks, . . . of any corporation, domestic or foreign, and issue in exchange therefor its stock . . . if authorized so to do by a provision in the certificate of incorporation of such stock corporation, or any certificate amendatory thereof or supplementary thereto, filed in pursuance of law, or if the corporation whose stock is so purchased, acquired, held or disposed of, is engaged in a business similar to that of such stock corporation, or engaged in the manufacture, use or sale of the property, or in the construction or operation of works necessary or useful in the business of such stock corporation, or in which or in connection with which, the manufactured articles, product or property of such stock corporation are or may be used, or is a corporation with which such stock corporation is or may be authorized to consolidate. When any such corporation shall be a stockholder in any other corporation as herein provided, its president or other officers shall be eligible to the office of director of such corporation, the same as if they were individually stockholders therein, and the corporation holding such stock shall possess and exercise in respect thereof, all the rights, powers and privileges of individual owners or holders of such stock."

Railroad Law, § 79 (Birdseye's, 1901): "Any railroad corporation . . . of this State . . . being the lessee of the road of any other railroad corporation, may

in their application to companies owning connecting lines. These railroad statutes, like similar statutes authorizing the

take a surrender or transfer of the capital stock of the stockholders, or any of them, in the corporation whose road is held under lease, and issue in exchange therefor the like additional amount of its own capital stock at par; and whenever the greater part of the capital stock of any such corporation shall have been so surrendered or transferred, the directors of the corporation taking such surrender or transfer . . . become *ex-officio* the directors of the corporation whose road is held under lease, and shall manage and conduct the affairs thereof . . . and when the whole of such capital stock has been so surrendered or transferred, and a certificate thereof filed in the office of the Secretary of State . . . the estate . . . and franchises of the corporation whose stock shall have been so surrendered or transferred shall . . . vest in . . . the corporation to whom such surrender or transfer is made. . . . Where stock shall have been so surrendered or transferred, the existing liabilities of the corporation, and the rights of the creditors and of any stockholder not surrendering or transferring his stock, shall not be affected thereby."

North Carolina. Laws 1885, ch. 108, § 2, p. 159: "Any railroad or other transportation company may acquire and hold or guarantee, or indorse the bonds or stocks of . . . any railroad or branch railroad, or other transportation line in this or an adjoining State connecting with it directly or indirectly."

Pub. Laws 1901, ch. 2, § 55, page 28 (same as *New Jersey Stat. Rev.* 1896, ch. 4, § 51, *supra*).

Ohio. Bates' Anno. Stat. (1787-1902), § 3300, authorizes railroad companies to subscribe for stock in aid of a connecting, but not competing, road. *Ib.* § 3546, authorizes railroad companies to subscribe for the stock of certain bridge companies. *Ib.* § 3631, authorizes certain stock subscriptions by benevolent companies; *ib.* § 3842, by elevator companies; *ib.* § 3863, by

"mineral and vegetable mining and boring companies."

Pennsylvania. Gen. Laws 1894, § 132: "Any and all companies incorporated or organized under the laws of this Commonwealth, . . . and . . . the directors, managers, or trustees thereof, with the approval of the stockholders," may "invest the surplus or other funds or earnings of such companies in . . . ; good stocks or securities and" may "sell and transfer the same, and" may "reinvest the proceeds of such sales in . . . stocks of like kind and" may "prescribe, by resolution of the directors, or the bylaws of the company, or otherwise, the mode of making such investments, purchases and sales, with the approval of the stockholders."

Laws 1901, p. 62, Act No. 28: "Any railroad or other transportation corporation, of this Commonwealth," may "from time to time . . . acquire, own and hold, pledge, sell or otherwise dispose of, the stock . . . and guarantee the stock . . . of any other corporation of this Commonwealth or elsewhere, engaged in the business of transportation, either on land or water, and also of any other warehouse, storage elevator or terminal company, whose business is incidental to the business of transportation in which the purchasing or guaranteeing corporation shall be authorized to engage."

For other *Pennsylvania* statutes authorizing the purchase of stock by railroad companies see Bright. *Purd. Dig.* 1894, §§ 156, 167, 168 and 182. For provisions relating to the purchase of stock by manufacturing or water companies, see Gen. Laws 1894, ch. 5, § 44. For provisions authorizing corporate purchase of stock of iron and steel companies, see *ib.* title "Iron and Steel Companies," § 7. See also *ib.* ch. 15, § 129, for provisions as to stock of a particular steamship company.

South Carolina. Laws 1894, p. 812: "No corporation . . . owning or oper-

consolidation of companies owning, and the purchase and lease of, continuous lines of railroad, are all indicative of the

ating . . . any railroad lying, in whole or in part, within this State, or owning . . . a majority of the stock of the corporation owning or controlling . . . any such railroad, shall own or be interested in the stock of any corporation chartered by this State which owns or leases . . . any railroad which competes . . . with" such other railroad.

R. S. 1893, § 1624: "Railroad companies . . . of this State may . . . purchase and hold the stock . . . of other railroad companies chartered by or whose roads are authorized to extend into this State. . . . And any railroad corporation . . . of this State may guarantee the stocks and bonds . . . of any other railroad corporation, whenever the roads of such corporations shall connect with each other, or shall form a continuous line, directly or by means of any connecting railroad, or by steamboat line . . . upon such terms and conditions as may be agreed upon by the stockholders."

South Dakota. R. S. 1901, § 3906, authorizes a railroad company to subscribe for stock in aid of the construction of another railroad.

Texas. Sayles' Civil Stat. ch. 16a, § 744b: "Railway companies existing under the laws of this State . . . and railway companies . . . of the United States, are authorized . . . to subscribe to the stock and purchase and own stock . . . of any depot company formed under authority of this chapter."

Utah. Laws 1901, ch. 26, p. 22, confer general power upon railroad companies to purchase, or otherwise lawfully acquire, the stock of other railroad companies.

Vermont. Stat. 1894, § 3758: "No railroad company shall subscribe for, take, or hold, directly or indirectly, stock . . . of a railroad corporation organized under this chapter, unless specially authorized by the general assembly."

Virginia. Code 1887, ch. 46, § 1070:

. . . "One company shall not subscribe to, purchase or otherwise acquire the stock of another company unless specially authorized by act of legislature, or by terms of decree of court, or order of the judge incorporating the company or amending the charter thereof. If any company shall acquire stock in any other company contrary to the provisions of this section, it shall not be lawful for it to vote such stock in any general or special meeting of stockholders."

Ib. § 1071: "The preceding section shall not prevent a company from receiving stocks . . . in satisfaction of any judgment, order, or decree, or as collateral security for, or in payment of, any debt, or from purchasing stocks . . . at any sale made for its benefit."

Washington. Ballinger's Codes & Stat. 1897, § 4311: "It shall be lawful for any corporation . . . of the Territory or State of Washington or . . . of any other State or Territory, or . . . of the United States, owning, leasing or operating any line or lines of railway within the State of Washington . . . to take, acquire, own, negotiate, sell . . . stocks of companies or corporations which are, or may hereafter be, organized for the purpose of irrigating and reclaiming lands within this State."

Ib. § 4267, authorizes Washington corporations incorporated before June 1, 1862, to purchase and deal in stocks.

West Virginia. Code 1899, ch. 52, p. 538 (Gen. Corp. Law), § 3: "No corporation shall . . . subscribe for or purchase the stocks . . . of any joint stock company."

Ib. § 4: "Any manufacturing company may with the assent of the holders of two-thirds of its stock, . . . subscribe for or purchase the stock . . . of any corporation formed for the purpose of manufacturing . . . any articles or materials manufactured . . . by such joint stock company, or constructing a railroad . . . through or into the county in which the principal place of business

policy of affording facilities for the uniting of short connecting roads into the through line.

The policy of the States, in general, as indicated, positively, in their legislative enactments, and negatively, in their failure to grant authority at all, is clearly opposed to unlimited corporate stockholding. New Jersey and Delaware, however, are conspicuous exceptions to the rule. In these States, the broadest possible power is conferred upon domestic corporations to "purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of" the shares of foreign and domestic corporations and "to exercise all rights, powers and privileges of ownership, including the right to vote thereon."

A policy for revenue only in the grant of charters is not productive of limitations upon corporate powers. When an American Commonwealth goes into the business of selling privileges and immunities, it must make its offerings attractive. But how far these privileges will be recognized in other States is quite a different question.

§ 272. Power to subscribe for Stock in Foreign Corporations.

— The principle has been laid down that, conceding that corporations may subscribe for stock in other corporations of

of such joint stock company may be, or operating a railroad or other work of internal improvement." Any corporation may take stocks in payment of a debt owing it, etc.

Ib. ch. 53, § 3, p. 544 (stock company law), is the same as § 4, ch. 52, *supra*.

As to subscriptions to stock of bridge companies, see *ib.* ch. 44, § 22.

Wisconsin. R. S. 1889, ch. 36, § 1775, authorizes certain classes of corporations to purchase and hold stock in other corporations of the same or similar nature "upon the assent of the holders of three-fourths of the capital stock of both the corporation proposing to take such stock and the corporation in which it is proposed to be taken." Laws 1899, ch. 191, amending § 1833, Stat. 1898, authorizes the purchase, by railroad companies, of stock in connecting

roads or in companies to which they have furnished aid for the construction of their roads.

Stat. 1898, § 1862 *a*, authorizes street railway companies to purchase and take the stock of other street railway or any electrical companies.

Wyoming. R. S. 1899, § 3040 (Gen. Corp. Law): "It shall not be lawful for such company to use any of its funds in the purchase of any stock in any other company . . . ; provided, however, such company may, in its discretion, purchase, hold and own any stock, and to any amount, in any other company that is or may be subsidiary or tributary to, and that does contribute to the objects and purposes of the first company in this proviso mentioned."

Ib. §§ 3205 and 3206, authorize railroad companies to subscribe for stock in aid of the construction of other roads.

the same nature governed by the same laws, such power cannot be exercised where the two corporations exist under different laws of different States, and where the law governing the corporation in which stock is taken fails to impose liabilities and create obligations imposed upon the subscribing corporation.¹

The distinction, however, cannot stand the test of analysis. Conceding an incidental power to subscribe for stock concedes a power which cannot exist. If such an express power exists, the question whether it is broad enough to permit a subscription for stock in a foreign corporation is entirely a question of the construction of the particular statute. The argument that a subscription for stock in a foreign corporation is *ultra vires* because the subscribing corporation thereby incurs *less*

¹ *Merz Capsule Co. v. U. S. Capsule Co.*, 67 Fed. 417 (1895), (*affirmed sub nom. McCutcheon v. Merz Capsule Co.*, 71 Fed. 787 (1896)): "The general rule may be stated to be that it is incompetent for a corporation to subscribe for stock in another corporation. It must be acknowledged that there are exceptions to this rule, founded upon a variety of peculiar circumstances, which it is not necessary here to enumerate. I am unable to discover any ground upon which this case can be held within any of such exemptions. But, however this may be, if the corporation in which the stock is taken is a domestic one, and subject to the same laws and dominion as the one taking such stock, or where, if the corporations are organized in different States, they are subject to regulations of a substantially identical character, my opinion is that where, as in this case, the law of the corporation in which the stock is taken is of a substantially different character, and fails to impose the liabilities and create the obligations imposed by the law of the corporation subscribing for the stock, such subscriptions are *ultra vires* of the latter corporation, and are illegal and void. The laws of Michi-

gan, under which the complainant is incorporated, impose restrictions, duties, and obligations upon it of a character which indicate the purpose and policy of the laws of the State of Michigan in providing for its incorporation. I shall not go into details in respect to those provisions. They are sufficiently obvious upon an inspection of the statute. The general fact is sufficient for the present purpose. They are safeguards erected by the State, and constitute the bounds and conditions of corporate action. It is quite clear that the laws of New Jersey fail to make any of those conditions effectual or obligatory upon corporations organized thereunder, either in the original incorporation or in corporate action: and it is clear that the statutory regulations, in that regard, of the State of New Jersey, do not respond to what, by the laws of Michigan, is deemed essential. By the agreement in question the Michigan corporation conveys substantially its entire assets to the New Jersey corporation, abandons its business as a proprietor thereof, and becomes practically a mere employee of the New Jersey corporation, and subject to its dominion and control."

liabilities than in the case of a subscription to a domestic corporation, is not convincing.

The question whether the transaction is an unlawful combination depends upon considerations of public policy and not upon the powers of the corporations.¹

§ 273. *Construction of Statutes.* — Statutes authorizing corporations to acquire and hold the shares of other corporations constitute grants of power and require a reasonably strict construction.

Power conferred upon a corporation to “invest” its money in stocks does not authorize it to subscribe for stock in a projected corporation;² and, conversely, authority to subscribe does not confer power to purchase.³ Upon similar principles, a statute⁴ authorizing a railroad company to aid another in the construction of its road, by subscribing for its stock, does not authorize the purchase of the stock of a completed road.⁵

A statute⁶ authorizing a railroad company to purchase the stock of another railroad corporation, of which it is lessee, does not restrict the application of a general statute⁷ authorizing corporations, including railroad companies, to purchase and hold stock in other corporations engaged in a similar business.⁸

Authority to organize corporations “for any lawful purpose,” contained in a general incorporation act, has been held not to authorize the formation of a corporation for the express purpose of acquiring and holding stock in other corporations.⁹

¹ See *post*, Part V. : “*Combinations of Corporations.*”

² In *Commercial Fire Ins. Co. v. Montgomery County*, 99 Ala. 1 (1891), (14 So. Rep. 490, 42 Am. St. Rep. 17), it was held that the provision of the Alabama Code (Code 1886, § 1535), authorizing incorporated insurance companies to “invest their money in real and personal property, stocks, or choses in action,” did not authorize such a company to subscribe for stock in a corporation in process of formation.

³ A purchase by one railroad corporation of shares in another company is not authorized by a charter provision

conferring power to subscribe for and hold shares in such company. *Whitman v. Watkin* (Ch.), 78 Law T. Rep. 188 (1897).

⁴ *Ohio Rev. St.* § 3300.

⁵ *Columbus, etc. R. Co. v. Burke* (Com. Pl.), 19 Weekly Law Bull. 27 (1887). Compare *Baltimore v. Baltimore, etc. R. Co.*, 21 Md. 50 (1863).

⁶ *New York Laws* 1890, ch. 565.

⁷ *New York Laws* 1890, ch. 564, Art. 3, § 40.

⁸ *Oelbermann v. New York, etc. R. Co.*, 77 Hun (N. Y.), 332 (1894), (29 N. Y. Supp. 545).

⁹ *People v. Chicago Gas Trust Co.*,

On the other hand, a provision in the California Civil Code¹ authorizing the organization of private corporations "for any purpose for which individuals may lawfully associate themselves" has been held to permit the formation of a corporation for the specific purpose of purchasing, holding and selling stock in other companies.²

A statute authorizing one corporation to subscribe for or purchase stock in another corporation may be so construed as to make good a prior unauthorized acquisition.³

Authority in the charter of a banking corporation "to purchase securities of any kind" does not authorize the purchase of shares of other corporations.⁴

A statute authorizing a manufacturing corporation to acquire stock in other corporations with which it transacts business, does not authorize the purchase of the shares of an insolvent rival corporation which has ceased to transact business, for the purpose of obtaining its patronage.⁵

130 Ill. 268 (1889), (22 N. E. Rep. 798, 17 Am. St. Rep. 319).

¹ California Civil Code § 286.

² Market St. R. Co., v. Hellman, 109 Cal. 571 (1895), (42 Pac. Rep. 225). In this case the Court said (p. 590): "It is beyond controversy that individuals may lawfully associate themselves for the purpose of purchasing, selling, and dealing in all kinds of public and private stocks, bonds, and securities. The Pacific Improvement Company, having been organized for exactly that purpose, it is *intra vires* to purchase, hold and sell stock in other corporations."

³ *In re Buffalo, etc. R. Co.*, 74 N. Y. St. Rep. 345 (1896), 37 N. Y. Supp. (1048).

⁴ Bank of Commerce v. Hart, 37 Neb. 201 (1893), (55 N. W. Rep. 631): "But there is no provision in the bank's charter which, by any reasonable construction, can be construed into an authority to purchase and hold stocks of any other corporation. True, it says 'to purchase securities of any kind,' but certificates of stock are not securities within the meaning of this provision, nor such as the word imports

in commercial or banking phraseology. 'Securities,' as here used, mean notes, bills of exchange, and bonds; in other words, evidences of debt, promises to pay money."

Compare *Latimer v. Citizens Stat. Bank*, 102 Iowa, 162 (1897), (71 N. W. Rep. 225).

⁵ *De la Vergne Refrigerating Mach. Co. v. German Sav. Inst.*, 175 U. S. 40 (1899), (20 Sup. Ct. Rep. 20).

Partnership associations organized under the laws of Pennsylvania may own stock in corporations. *Layng v. French Spring Co.*, 149 Pa. St. 308 (1892), (24 Atl. Rep. 215); *Carter v. Producers, etc. Oil Co.* (Com. Pl.), 24 Pittsb. Leg. J. (n. s.) 380 (1894).

For construction of Kansas statutes relating to the purchase of stock by railroad companies see *Atchison, etc. R. Co. v. Fletcher*, 35 Kan. 236 (1886), (10 Pac. Rep. 596); *Atchison, etc. R. Co. v. Cochran*, 43 Kan. 225 (1890), (23 Pac. Rep. 151, 7 L. R. A. 414); *Atchison, etc. R. Co. v. Davis*, 34 Kan. 209 (1885), (8 Pac. Rep. 530). See also *Kimball v. Atchison, etc. R. Co.*, 46 Fed. 888 (1891).

§ 274. **Construction of Constitutional Prohibitions.** — The holding of stock in other corporations is beyond the powers of a corporation, in the absence of statutory authority. The holding of stock in other companies, in order to defeat competition, is opposed to public policy. Constitutional prohibitions of purchases for such a purpose are, therefore, unnecessary, except as imposing limitations upon the power of the legislature to grant authority. Such provisions have, however, been adopted in several States and have been construed by the courts.

The provision in the Pennsylvania constitution¹ that “no railroad, canal or other corporation . . . shall . . . in any way control any other railroad or canal corporation owning, or having under its control, any parallel or competing line” is violated by an arrangement made by a railroad company to buy the stock of a competing line. Ownership of a majority of its stock constitutes the “control” of a corporation, within the meaning of the provision.²

The prohibition in the Georgia constitution³ against the purchase by one corporation of the stock of any other corporation, tending to defeat or lessen competition or encourage monopoly, cannot be evaded by indirection; and the fact that stock in a competing corporation is obtained in the name of its managers, but for the use of a corporation, will not prevent the application of the constitutional provision.⁴

The holding, by a railroad corporation, of a controlling interest in the stock of a coal mining company is not in contra-

¹ *Pennsylvania Const. Art. XVII. § 4.* the road.” The Pennsylvania Court, however, said that this remark was

² *Pennsylvania R. Co. v. Common* merely a different way of stating the wealth (Pa. 1886), (7 Atl. Rep. 371). truism that a corporation is controlled by its stockholders.

³ *Georgia Const. Art. IV. § 2, par. 4.* In this case the purchasing corporation claimed that an arrangement to buy stock did not violate this constitutional provision, relying upon the remark of Chief Justice Waite in *Pullman Palace Car Co. v. Missouri Pacific R. Co.*, 115 U. S. 597 (1885), (6 Sup. Ct. Rep. 199), in speaking of a stockholding road: “Practically it may control the company, but the company alone controls

See *ante*, § 32, note.

⁴ *Langdon v. Branch*, 37 Fed. 449 (1888). See also as to construction of *Georgia* constitutional provision, *Trust Co. v. State*, 109 Ga. 736 (1900), (35 S. E. Rep. 323); *State v. Central R., etc. Co.*, 109 Ga. 716 (1900), (35 S. E. Rep. 37).

vention of another provision of the Pennsylvania constitution¹ that common carriers shall not engage in mining, or in manufacturing articles for transportation over their lines.²

A California constitutional provision forbids a corporation to engage in any business other than that expressly authorized by its charter or the law under which it is organized.³ It is held that a corporation, by acquiring stock in another corporation, becomes engaged in the business of that corporation within the meaning of the prohibition.⁴

III. *Incidental Power to acquire Stock.*

§ 275. *In General.*—An incidental power is one that is directly and immediately appropriate to the execution of a specific power granted, and not one that has a slight or remote relation to it.⁵ When the purchase of stock in another corporation is reasonably necessary to the full and complete exercise of the express powers of a corporation, power to make such purchase will be implied.⁶ Whether

¹ *Pennsylvania Const. Art. XVII. § 5.*

² *Hartwell v. Buffalo, etc. R. Co.*, 19 Pa. Co. Ct. 231 (1897).

³ *California Const. Art. XII. § 9.*

⁴ *Knowles v. Sandercock*, 107 Cal. 629 (1895), (40 Pac. Rep. 1047).

⁵ *Hood v. New York, etc. R. Co.*, 22 Conn. 16 (1852); *Franklin Co. v. Lewiston Sav. Inst.*, 68 Me. 43 (1877); *People v. Chicago Gas Trust Co.*, 130 Ill. 268 (1889), (22 N. E. Rep. 798, 17 Am. St. Rep. 319).

⁶ *Marbury v. Kentucky Union Land Co.*, 62 Fed. 335 (1894), *affirming s. o. sub nom. Tod v. Kentucky Union Land Co.*, 57 Fed. 47 (1893). In the latter decision the Court refers at length to *Louisville, etc. R. Co. v. Literary Society of St. Rose*, 91 Ky. 395 (1891), (15 S. W. Rep. 1065), in regard to the *implied powers* of a corporation. In that case two educational corporations, having power to contract and to buy and sell real and personal property for the purpose of carrying on their institutions of learning, owned and operated large farms of considerable value. Each of these cor-

porations subscribed a sum of money payable to a railroad company to induce it to extend its line near their property which would enhance its value. Regarding the defence of *ultra vires* to an action upon the subscriptions the Court said: "The building of the road was calculated, however, to be highly beneficial to them, both as furnishing convenient access to them for persons coming and going, and also in furnishing them a means of obtaining their supplies, and sending their product to market. It was calculated to, and undoubtedly did, add greatly to the value of their properties, and the large industries which their charters had authorized them to create. It conferred a direct benefit. The power existed, by fair implication, to do anything reasonably calculated to add to this value. How far this power extended, we need not decide. Certainly, however, if, during a portion of the year, these institutions had been almost inaccessible, for the lack of a turnpike or a bridge, a subscription by them to

such power exists in a particular case will depend upon the nature of the corporation and the objects for which the stock is to be acquired.

Corporations, like insurance companies, which find it necessary to keep large amounts of funds on hand, may, perhaps, without express authority, invest their surplus funds in the shares of dividend-paying corporations, while such a power would be denied a manufacturing company, in whose nature there is nothing which renders it proper to accumulate funds for outside investments.¹ But a manufacturing corporation, while without power to purchase shares in another corporation, might take them in payment of a debt.²

While an incidental power to invest funds in stocks may be implied in the case of a certain class of corporations, and a like power may be implied in the case of other corporations to take stocks in regular course of business, no such power can ever be implied to *subscribe* for shares in a new corporation and aid in the creation of a new enterprise.³

§ 276. **Incidental Power to make Investments in Stocks.** — Corporations whose objects require the investment of their capital and surplus funds for the purpose of deriving an income may, it is held, for that purpose, without express statutory authority, invest in the shares of other dividend-paying corporations.⁴ Thus, in *Hodges v. New England Screw*

build either would have been valid; and, while not authorized to enter into any manner of speculations, yet, in our opinion, a subscription by them to aid the building of this road was not, under all the circumstances, *ultra vires*, and therefore void."

For a very broad view of incidental powers in reference to the purchase of stocks see *Hill v. Nisbet*, 100 Ind. 349 (1884).

¹ *People v. Chicago Gas Trust Co.*, 130 Ill. 268 (1889), (22 N. E. Rep. 798, 17 Am. St. Rep. 319). See *post*, § 276: "*Incidental Power to make Investments in Stocks.*"

² *Post*, § 277: "*Incidental Power to take Stock in Satisfaction of Debt.*"

³ *Smith v. Newark, etc. R. Co.*, 8 Ohio Cir. Ct. Rep. 583 (1894).

⁴ *Hodges v. New England Screw Co.*, 1 R. I. 312 (1850), (53 Am. Dec. 624); s. c. 3 R. I. 9 (1853); *Talmage v. Pell*, 7 N. Y. 343 (1852); *Pearson v. Concord R. Corp.*, 62 N. H. 537 (1883). In the last case the Supreme Court of New Hampshire (*per Smith, J.*) said (p. 549): "Certain classes of corporations, such as religious and charitable corporations, and corporations for literary purposes, may rightfully invest their moneys in the stocks of other corporations. The power, if not expressly mentioned in their charters, is necessarily implied, for the preservation of the funds with which such institutions

Co.¹ the Supreme Court of Rhode Island said: "There are large classes of corporations in Rhode Island, and the other States, which may and do rightfully invest their capital in the stock of other corporations; such, for instance, as religious and charitable corporations, and corporations for literary and scientific purposes. So, insurance companies may rightfully invest their capital in the stock of other corporations, such as banks and railroads, and the like."

No such incidental power, however, exists in corporations generally,² and it is difficult, upon principle, to justify its existence in the class of corporations referred to.³ Although such corporations have, as immediately appropriate to the exercise of their chartered powers, the right to invest their funds for the purpose of deriving an income, the field for investment is so large that it may well be denied that it is reasonably necessary to invest in the shares of other corporations and assume the responsibilities of stockholders therein.

are endowed, and to render their funds productive. So, an insurance company or savings bank may rightfully invest its capital or deposits in the stocks of railroad companies, banks, manufacturing companies, and similar corporations. The power is necessary to enable them to engage in the business for which they are organized, and hence is implied, if not expressly granted, in their charters. Such investments are in the line of their business. On the other hand, a manufacturing or railroad corporation is incorporated to do the business of manufacturing, or transporting passengers and merchandise. Investing their funds in that of other corporations is not in the line of their business. Under extraordinary circumstances, it may become necessary for a national bank, or a manufacturing corporation, or a railroad corporation, to acquire stock in another corporation, as in satisfaction of a valid debt, or by way of security, but with a view to its subsequent sale or conversion into money so as to make good or redeem an anticipated loss."

¹ *Hodges v. New England Screw*

Co., 1 R. I. 347 (1850), (53 Am. Dec., 624); s. c. 3 R. I. 9 (1853).

² *People v. Chicago Gas Trust Co.*, 130 Ill. 268 (1889), (22 N. E. Rep. 798, 17 Am. St. Rep. 319); *McCutcheon v. Merz Capsule Co.*, 71 Fed. 787 (1896); *Pearson v. Concord R. Corp.*, 62 N. H. 537 (1883). See also cases cited in note to ante, § 264: "*Necessity for Statutory Authority to purchase Stock. Rule in United States.*"

The decision in *Smith v. Newark, etc. R. Co.*, 8 Ohio Cir. Ct. Rep. 583 (1894), that a railroad company, unless prohibited, may invest in the dividend-paying stocks of other corporations, has no foundation in principle or authority.

³ In *People v. Chicago Gas Trust Co.*, 130 Ill. 283 (1889), (22 N. E. Rep. 798, 17 Am. St. Rep. 319), the Court said: "Some corporations, like insurance companies, may find it necessary to keep funds in hand for the payment of losses by death or fire, or to meet other necessary demands, but it is questionable whether even these can invest their surplus funds in the stocks of other corporations, without special legislative authority."

The importance of this question is, however, minimized by the fact that, at the present time, the investments of savings banks, insurance companies and other corporations of a similar nature are generally regulated by statute.

§ 277. **Incidental Power to take Stock in Satisfaction of Debt.** — As an incident to the power to transact business, enter into contracts and become a creditor, a corporation has the power to do what is necessary in order to collect debts due it, and may take title to all kinds of property, including the stock of other corporations, in payment or compromise of a debt.¹ The acquisition of stock, for such purposes, is directly appropriate to the execution of the specific powers conferred upon every banking, manufacturing and mercantile corporation.

Shares of stock may be so taken in satisfaction of a debt with a view to sell them again, although the corporation is without authority to purchase or invest its funds in such shares. In *Charlotte First National Bank v. National Exchange Bank*² Mr. Chief Justice Waite said: "Dealing in stocks is not expressly prohibited; but such a prohibition is implied from the failure to grant the power. In the honest exercise of the power to compromise a doubtful debt owing to a bank, it can hardly be doubted that stocks may be accepted in payment and satisfaction, with a view to their subsequent sale or conversion into money so as to make good or reduce an anticipated loss. Such a transaction would not amount to a dealing in stocks."

¹ *Charlotte First Nat. Bank v. etc. Metal Co., supra*, the statute under National Exch. Bank, 92 U. S. 122 which the corporation was organized (1875); *Citizens State Bank v. Hawkins*, 71 Fed. 369 (1896); *Holmes, etc. Mfg. Co. v. Holmes, etc. Metal Co.*, 127 N. Y. 252 (1891), (27 N. E. Rep. 831, 24 Am. St. Rep. 448); *Talmage v. Pell*, 7 N. Y. 328 (1852); *People v. Chicago Gas Trust Co.*, 130 Ill. 268 (1889), (22 N. E. Rep. 798, 17 Am. St. Rep. 319); *Hodges v. New England Screw Co.*, 1 R. I. 312 (1850), 3 R. I. 9 (1853); *Howe v. Boston Carpet Co.*, 16 Gray (Mass.) 493 (1860).

In *Holmes, etc. Mfg. Co. v. Holmes*,

² *Charlotte First Nat. Bank v. National Exch. Bank*, 92 U. S. 128 (1875).

The stock must, however, be taken, in good faith, in satisfaction of an existing debt, and such incidental power cannot be exercised as a mere device to cover an unauthorized transaction. Thus, a corporation cannot, without statutory authority, sell goods to another corporation and create a debt, with an express understanding that it is to be satisfied by the delivery of stock of the purchasing corporation.¹

Upon principles similar to those just stated, a corporation, in compromising a contested claim *against* it, may pay a larger sum than would have been exacted in satisfaction of the claim, in order to obtain a transfer of stocks in other corporations in the *bona fide* belief that, by turning them into money under more favorable circumstances, it may diminish its loss.²

A corporation may levy upon shares of stock in other corporations held by its debtor, may sell the same upon execution and, if necessary, may buy them in, whenever such levy and sale would be permitted in the case of a natural person.³

§ 278. **Incidental Power to take Stock as Collateral.**—For the same reason that corporations possess the incidental power to take the stock of other corporations in satisfaction of a debt, they have the power to accept such stock as *security* for an existing indebtedness.⁴

¹ Valley R. Co. v. Lake Erie Iron Co., 46 Ohio St. 44 (1888), (18 N. E. Rep. 486, 26 Am. & Eng. Corp. Cas. 55). See also Charlotte First Nat. Bank v. National Exch. Bank, 92 U. S. 122 (1875). Compare Howe v. Boston Carpet Co., 16 Gray (Mass.), 493 (1860); Treadwell v. Salisbury Mfg. Co., 7 Gray (Mass.), 393 (1856).

In White v. Marquadt (Iowa, 1897), 70 N. W. Rep. 193, the Supreme Court of Iowa held that while a corporation might not buy shares in another corporation it could take them in exchange for goods. The Court said: "If it had purchased the stock outright, as a purely business venture, it may be that the defence here interposed would prevail. But this it did not do. It received the stock while carrying on business in the usual manner, in ex-

change for property which it was authorized to sell. These shares were tangible property, and as no limitations were imposed by its articles of incorporation as to the kind of property it should take in payment for the merchandise it was authorized to sell, we think it had power to accept the shares of stock in payment."

The distinction is, obviously, without foundation. It is impossible to distinguish in principle between buying with money and money's worth.

² Charlotte First Nat. Bank v. National Exch. Bank, 92 U. S. 122 (1875).

³ Citizens State Bank v. Hawkins, 71 Fed. 369 (1896).

⁴ California Bank v. Kennedy, 167 U. S. 362 (1897), (17 Sup. Ct. Rep. 831), reversing Kennedy v. California Savings Bank, 101 Cal. 495 (1894),

Upon similar principles, a corporation, having the power to loan money, may, as incidental to the exercise of that power, and in the usual course of business, accept the stock of another corporation as collateral security for a present loan, although the purchase of such stock for investment purposes or otherwise may be wholly *ultra vires*. Taking stock as security does not constitute dealing in stocks.¹

Corporations acquiring stock as collateral have all the rights of natural persons to make the security available, and, in enforcing their rights as pledgees, may become the owners of the collateral.²

(35 Pac. Rep. 1039, 40 Am. St. Rep. 169). See also cases cited in notes to last section. *v. National Exch. Bank*, 92 U. S. 128 (1875)."

¹ *United States v. Kennedy*, 167 U. S. 366 (1897), (17 Sup. Ct. Rep. 831), Justice White said: "It is well settled that the United States statutes relative to national banks constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers except those expressly granted, or which are incidental to carrying on the business for which they are established. *Logan County Bank v. Townsend*, 139 U. S. 73 (1891), (11 Sup. Ct. Rep. 496). No express power to acquire the stock of another corporation is conferred upon a national bank, but it has been held that, as incidental to the power to loan money on personal security, a bank may, in the usual course of doing such business, accept stock of another corporation as collateral, and, by the enforcement of its rights as pledgee, it may become the owner of the collateral and be subject to liability as other stockholders. *National Bank v. Case*, 99 U. S. 628 (1878). So, also, a national bank may be conceded to possess the incidental power of accepting in good faith stock of another corporation as security for a previous indebtedness. It is clear, however, that a national bank does not possess the power to deal in stocks. The prohibition is implied from the failure to grant the power. *Charlotte First Nat. Bank*

See also *Citizens State Bank v. Hawkins*, 71 Fed. 369 (1896); *County Court v. Baltimore, etc. R. Co.*, 35 Fed. 161 (1888); *Shoemaker v. National Mech. Bank*, 1 Hughes, 101 (1869), (21 Fed. Cas. 1331).

Iowa: *Calumet Paper Co. v. Stotts Invest. Co.*, 96 Iowa, 147 (1895), (64 N. W. Rep. 782).

Minnesota: *Baldwin v. Canfield*, 26 Minn. 43 (1879), (1 N. W. Rep. 261).

New York: *Talmage v. Pell*, 7 N. Y. 328 (1852); *Milbank v. New York, etc. R. Co.*, 64 How. Pr. 20 (1882).

Ohio: *Contra*, *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350 (1881), (38 Am. Rep. 594).

England: *Royal Bank of India's Case*, L. R. 4 Ch. App. 252 (1869).

² *California Bank v. Kennedy*, 167 U. S. 366 (1897), (17 Sup. Ct. Rep. 831); *National Bank v. Case*, 99 U. S. 628 (1878). *Latimer v. Citizens State Bank*, 102 Iowa, 162 (1897), (71 N. W. Rep. 225); *Talmage v. Pell*, 7 N. Y. 728 (1852). In the *Royal Bank of India's Case*, L. R. 4 Ch. App. 252 (1869), it was said that the bank having advanced money upon the security of certain shares, the directors were justified in doing "anything which was a prudent and proper act for them to do with a view to obtaining the benefit of such security."

§ 279. **Incidental Power to acquire Stock in Connection with Consolidation or Purchase.** — A corporation having power to consolidate with another, may, for the purpose of effecting consolidation, purchase the stock of such other corporation whenever such purchase is reasonably necessary as a means to that end. Power to make such purchase will be implied from the broader power to consolidate.¹ In *Louisville Trust Co. v. Louisville, etc. R. Co.*² Judge Taft said: "It is true that, ordinarily, one corporation has no power to acquire stock in another, because it involves the investment of the corporate funds in an enterprise over which the corporate officers have no control, and risks them in a business which is foreign to that for which the stockholders advanced their money. But it has been decided that a power to acquire stock in another company may be implied from the power to consolidate with such company, as a proper step towards consolidation, or as necessarily included in the grant of so large a power."

It is clear that for the purpose of consolidating, — real and not assumed — power to purchase stock may be implied from power to consolidate, but it cannot be true that the one is "necessarily included in the grant of" the other, so that a

¹ *Louisville Trust Co. v. Louisville, etc. R. Co.*, 75 Fed. 433 (1896); *Hill v. Nisbet*, 100 Ind. 341 (1885); *Ryan v. Leavenworth, etc. R. Co.*, 21 Kan. 365 (1879), (19 Am. Rep. 129); *Wall v. London, etc. Assets Corp.*, 2 Ch. 469 (1898), (67 L. J. Ch. 596, 79 L. T. (N. S.) 249, 47 W. R. 219).

A land company empowered to form a "temporary or permanent consolidation" with any railway company, in furtherance of its general powers may purchase all the stock of a railway company, and thereby control the same, if such control is a furtherance of the general powers of the land company. *Tod v. Kentucky Union Land Co.*, 57 Fed. 47 (1893), *affirmed sub nom. Marbury v. Kentucky Union Land Co.*, 62 Fed. 335 (1894), where, in deciding the appeal, Judge Taft said: "The cases

last cited are all of them stronger cases than the one at bar, for in all of them the courts were obliged by construction to go outside and permit the investment of the property of the company in a business not expressly authorized by the charter. Here we keep within the letter of the charter, for here the company has the right to embark its entire capital and risk it all by consolidation with a railway company in the business of building and running a railroad, and we only hold that, having such power, it has the right to do less than that, and risk only a part of its funds by lending its credit to such a railway company, and retaining control of it by owning its entire stock."

² *Louisville Trust Co. v. Louisville, etc. R. Co.*, 75 Fed. 445 (1896).

corporation, having power to consolidate, may purchase stock merely for the purpose of obtaining control. As said by the Supreme Court of New Jersey in *Elkins v. Camden, etc. R. Co.*:¹ "Union and consolidation of two railroad companies are one thing, and the purchase by one company of the property and franchises of the other, is another. What the defendant proposes to do is, not to unite and consolidate with the other company, but to purchase the means of controlling the property and franchises of that company. . . . The transaction under consideration must be regarded as an agreement to buy stock and bonds. . . . As such, irrespective of the assumed ulterior object in the purchase, it is not even suggested that it is legitimate."

Upon similar principles, a corporation, having express power to purchase the property and franchises of another corporation, has, as an incident thereto, power to purchase the stock of such corporation for the purpose of thereby acquiring the property and franchises, but not for the purpose of merely obtaining an interest in the corporation or of controlling it.²

§ 280. **Incidental Power to take Stock upon a Reorganization.** — While it may be beyond the implied powers of a corporation to invest its funds in the stock of another corporation, yet when it becomes the owner of bonds of another company, which undergoes a process of reorganization involving the issue of stock in a new company in place of the bonds of the old, the former corporation has implied power to exchange its bonds for stock.³ This power is merely a variation of the

¹ *Elkins v. Camden, etc. R. Co.*, 36 N. J. Eq. 12 (1882). Co., 91 Mich. 351 (1892), (51 N. W. Rep. 1063).

² It has, however, been held that, under a *Tennessee* statute authorizing a corporation to acquire, by purchase or other lawful contract, and to hold the property of another corporation of a similar kind, such a corporation might purchase the majority of the stock of another corporation to enable it to control it, and exercise practical ownership over it. *Wehrhane v. Nashville, etc. R. Co.*, 4 N. Y. St. Rep. 541 (1886).

See also *Dewey v. Toledo, etc. R.*

That power to lease another company's railroad may include power to buy its shares was held in *Atchison, etc. R. Co. v. Fletcher*, 35 Kan. 247 (1886), (10 Pac. Rep. 596).

³ In *Deposit Bank v. Barrett*, 11 Ky. Law. Rep. 910 (1890), (13 S. W. Rep. 337), the Court said: "A bank, it is true, has no power to invest its means in railroads, as coming within the scope of its powers as a corporation. It may accept mortgages, stock, or even pur-

incidental power to take stock in payment or compromise of a debt.

§ 281. **Incidental Power to take Stock in Exchange for Corporate Assets.** — Upon principles already considered at length, a corporation has no implied power to transfer its entire property to another corporation in exchange for its shares. The acquisition of stock, in such a manner, is *ultra vires* and an infringement upon the rights of dissenting stockholders.¹

chase the road itself, to secure its debts, and we perceive no reason why the bank could not have accepted stock in the new company in payment of what was owing by the old company."

¹ See *ante*, ch. 11, subdiv. II.: "*Exchange of Property of One Corporation for Stock of Another*," §§ 118-122.

In the preceding part of this treatise this subject is considered with especial reference to the rights of dissentient stockholders. The following cases are upon the point that a transfer of corporate assets for stock is *ultra vires*.

In *Easun v. Buckeye Brewing Co.*, 51 Fed. 156 (1892), an Ohio corporation — a solvent concern — contracted to sell all its plant and assets and take in payment stock and bonds of another corporation to be reorganized to carry on the business. It was held that the contract was *ultra vires* — that one corporation could not become the owner of stock of another unless expressly authorized. The Court stated, however, that an insolvent corporation might make such transfer under certain circumstances. In *Byrne v. Schuyler Electric Mfg. Co.*, 65 Conn. 336 (1895), (31 Atl. Rep. 833), an insolvent manufacturing company, without express authority, transferred all its property to another corporation, receiving in return shares of the latter company. This was done, not for the purpose of winding up the company's affairs and dividing the stock or its avails among the stockholders, but to keep the insolvent corporation alive and transact business through the agency of another corporation. *Held*, that the transfer was *ultra vires* and void.

See also *McCutcheon v. Merz Capsule Co.*, 71 Fed. 787 (1896); *Mackintosh v. Flint, etc. R. Co.*, 34 Fed. 583 (1888); *Taylor v. Earle*, 8 Hun (N. Y.), 1 (1876); *Boston, etc. R. Co. v. New York, etc. R. Co.*, 13 R. I. 260 (1881).

In *Holmes, etc. Mfg. Co. v. Holmes, etc. Metal Co.*, 127 N. Y. 252 (1891), (27 N. E. Rep. 831), the New York Court of Appeals, although deciding the case upon other grounds, said that, all the stockholders agreeing, the question whether the acquisition of stock for corporate property was *ultra vires* depended rather upon whether it was necessary to take the stock in the exercise of the corporate franchises and transaction of the corporate business than upon the question whether there was an intention to immediately sell it and wind up the company's affairs. See also *Howe v. Boston Carpet Co.*, 16 Gray (Mass.), 493 (1860.)

In *Taylor v. North Star Gold Mining Co.*, 79 Cal. 285 (1889), (21 Pac. Rep. 753), where a mining corporation transferred its mine for stock in another corporation, it was held that the transaction could not be collaterally attacked as *ultra vires*. See also *Wagner v. Marple*, 10 Tex. Civ. App. 505 (1895), (31 S. W. Rep. 691).

It has been held that the transfer of corporate assets for stock, without specific authority, is not *ultra vires* when the stock is "taken with a view to sell it again and not permanently to hold it." *Hodges v. New England Screw Co.*, 1 R. I. 347 (1850). See also *Byrne v. Schuyler Electric Mfg. Co.*, 65 Conn. 336 (1895), (31 Atl. Rep.

§ 282. **Miscellaneous Instances of Incidental Power to acquire Stock.** — It has been held that a corporation, in order to borrow money for use in its business, may subscribe for stock in a building and loan association.¹ The authorities, however, are not uniform as to the existence of such an incidental power.² The primary object of a building association is to enable its members to own their homes, and a subscription by a corporation to such an association would seem, upon principle, to be *ultra vires* both of the corporation and the association.

A manufacturing corporation, as a means of insuring its property, may become a member of a mutual fire insurance company.³ A land and development company, having power to build a short railroad in connection with the development of its wild lands, may, it has been held, subscribe for stock in a railroad furnishing access to such lands.⁴

833); *Easun v. Buckeye Brewing Co.*, 51 Fed. 156 (1892); *Buford v. Keokuk, etc. R. Co.*, 3 Mo. App. 159 (1876); *Miner's Ditch Co. v. Zellerbach*, 37 Cal. 543 (1869). But this does not mean, necessarily, that such a transfer, although *intra vires*, is effective against dissenting stockholders. The conclusion that a corporation has power does not imply that a majority may always exercise it. As pointed out in the sections referred to, minority stockholders have the right to insist that corporate assets shall be sold, not exchanged, when the exigencies of the corporation require their disposition.

¹ *Union, etc. Ass'n v. Masonic Hall Ass'n*, 29 N. J. Eq. 389 (1878); *State v. Rohlfes* (N. J. 1890), 19 Atl. Rep. 1099; *Norwalk Savings Bank Co. v. Norwalk Metal Spinning, etc. Co.*, 14 Ohio Cir. Ct. Rep. 1 (1897). Compare *Wilson's Case*, L. R. 12 Eq. 516 (1871); *Kadish v. Garden City, etc. Ass'n*, 151 Ill. 531 (1894), (38 N. E. Rep. 536).

It has been held that a corporation which becomes a stockholder of, and a borrower from, a building and loan association, although acting beyond its powers, is estopped from pleading *ultra*

vires to a suit to enforce the security given. *Bowman v. Foster, etc. Co.*, 94 Fed. 592 (1899); *Blue Rapids Opera House Co. v. Mercantile Building, etc. Ass'n* (Kan. 1898), 53 Pac. Rep. 761.

² In *Mechanics, etc. Bank v. Meriden Agency Co.*, 24 Conn. 159 (1855), a joint stock corporation organized "to do a general insurance agency, commission and brokerage business" was held to have no power to subscribe for the stock of a building and loan association, and the loan was treated as if made to a stranger.

In *German American, etc. Ass'n v. Droge*, 14 Ind. App. 691 (1895), (43 N. E. Rep. 475), it was held that one building and loan association had no power to accept stock of another such association in payment for its own stock.

³ *St. Paul Trust Co. v. Wampach Mfg. Co.*, 50 Minn. 93 (1892), (52 N. W. Rep. 274).

⁴ *Watt's Appeal*, 78 Pa. St. 370 (1875).

Compare cases referred to in the text with the decision of the Supreme Court of Illinois in *People v. Pullman Car Co.*, 175 Ill. 125 (1898), (51 N. E.

A subscription by a hotel company to a corporation projected for the purpose of holding an international military encampment, which might bring large numbers of strangers to the city in which the hotel of the subscribing company was located and increase its business, was said, by the Supreme Court of Illinois, not to be so foreign to the business of keeping a hotel as to call for the application of the doctrine of *ultra vires*.¹

§ 283. **Presumption of Power to hold Stock.** — *Omnia acta rite esse praesumuntur*. The law presumes that a corporation acts within the scope of its powers. Corporations are authorized to acquire the stock of other corporations for certain purposes, and under certain conditions. When, therefore, a corporation takes stock, it will be presumed that it acquires it for an authorized purpose. The burden of proof is upon the person alleging that the corporation has exceeded its powers.²

Rep. 664), where it was held that, in the absence of express statutory authority, one corporation could not hold stock in another, although the latter, while existing as an independent company, was in fact a mere department or agency of the former.

¹ *Richelieu Hotel Co. v. International, etc. Co.*, 140 Ill. 248 (1892), (29 N. E. Rep. 1044). This decision can be justified, if at all, only upon the ground that the subscription was really a *donation* which the corporation might have made in the expectation of reaping a benefit in return. It should be compared with that of the Supreme Court of Georgia in *Military Interstate Ass'n v. Savannah, etc. R. Co.*, 105 Ga. 421 (1898), (31 S. E. Rep. 200): "We agree with the trial judge in holding that, under the facts alleged, the attempted subscription of the defendant to the capital stock of the plaintiff association was an act *ultra vires* and, therefore, void, although it is conceivable that, because of the 'competitive drills, rifle contests, shot-gun tourna-

ments, . . . the business of the railway company might be incidentally increased, if it affirmatively appeared that its line ran to the grounds upon which these fascinating and diverting performances were to take place."

² *Evans v. Bailey*, 66 Cal. 112 (1884), (4 Pac. Rep. 1089). And see *Ryan v. Leavenworth, etc. R. Co.*, 21 Kan. 365 (1879).

Where, in proceedings to condemn land for railroad purposes, it appeared that one of the subscribers to the capital stock of the petitioner was a corporation, and that its subscription was essential to make up the required amount to be paid before condemning, it was held that, in the absence of any proof, it would not be presumed against the act of the corporation and its payment of the percentage, that it acted beyond its powers. As to whether the land owners could raise or try the question, *quære*. *Matter of Rochester, etc. R. Co.*, 110 N. Y. 119 (1888), (17 N. E. Rep. 678).

CHAPTER XXVI.

RIGHTS AND OBLIGATIONS OF CORPORATION AS STOCKHOLDER.

I. *Intra Vires Holdings.*

- § 284. Status of Corporation holding Stock.
- § 285. Nature of "Holding Corporations."
- § 286. Rights of Foreign Corporation holding Stock.
- § 287. Incidents of Ownership attach to *Intra Vires Holdings*.

II. *Ultra Vires Holdings.*

- § 288. What Incidents of Ownership attach to *Ultra Vires Holdings*.
- § 289. Liability for Assessments upon *Ultra Vires Holdings*.
- § 290. *Ultra Vires* Contracts for Purchase of Stock — Collateral Contracts.
- § 291. Independent Contracts.
- § 292. Holding Stock to prevent Competition.
- § 293. Remedies in Case of *Ultra Vires* Stockholding.

I. *Intra Vires Holdings.*

§ 284. Status of Corporation holding Stock. — The lawful acquisition by one corporation of stock in another — even to the extent of holding all its shares — in no way affects the legal entity of the two corporations, as between themselves, and each continues its separate existence.¹ This is an application of the rule — necessary in the relations between a corporation and its stockholders, and between a corporation and third persons, — that a corporation is an entity distinct and apart from its stockholders. It is, however, founded upon a legal fiction, and may be disregarded in the relations between a corporation and the State.

¹ In *Exchange Bank v. Macon, etc. Co.*, 97 Ga. 5 (1895), (25 S. E. Rep. 326), Judge Lumpkin said: "Every corporation is a person — artificial, it is true, but nevertheless a distinct legal entity. Neither a portion nor all the natural persons who compose a corporation, or who own its stock and control its affairs, are the corporation itself; and when a single individual composes a corporation, he is not himself the corporation. In such a case, the man is one person, created by

the Almighty, and the corporation is another person, created by the law. It makes no difference in principle whether the sole owner of the stock of a corporation is a man or another corporation. The corporation owning such stock is as distinct from the corporation whose stock is so owned, as the man is from the corporation of which he is a member." See also *Button v. Hoffman*, 61 Wis. 20 (1884), (20 N. W. Rep. 667).

A corporation, as a stockholder, has all the rights of other stockholders, and is equally subject to the corresponding obligations.

285. **Nature of "Holding Corporations."** — In a broad sense, any corporation, having power to hold stock in another corporation, becomes, upon its exercise, a "holding corporation." The phrase in modern corporation law, however, is applied specifically to corporations organized, under statutes conferring the power, for the express purpose of acquiring and holding the stock of other corporations.

The essential feature of a holding corporation is that it *holds* stock. A corporation which deals in stocks is not a holding corporation.

The holding corporation is the modern device for uniting corporate interests. Consolidation requires the formal vote of a stipulated majority of the stockholders, and the termination of the existence of one or more of the corporations. In case of a sale, the vendor's interests in the corporate property are parted with absolutely. In case of a lease, the lessor has no other interest than the rental and remainder. Express legislative authority is, moreover, essential in case of consolidation, sale, or lease. The holding corporation, on the other hand, is a flexible agency. Its power depends upon *its* charter. The only prerequisite to the practical union of two or more corporations through a holding corporation, is the ownership of a bare majority of the capital stock of each company. The only formality is the transfer of the shares to the holding corporation.

The fiction of distinct corporate existence may lead to the conclusion that, although the control of several corporations is held by a single company, the corporations themselves remain separate and distinct as before. But while this conclusion, in a merely technical sense, may be well founded, it hardly warrants the corollary — convenient in some cases — that two corporations controlled by a single stockholder in its own interest, are *in reality* competing companies and entirely independent.

Holding corporations have taken the place of the earlier

“ trusts ” in the formation of industrial combinations. They have also been employed to effect a practical consolidation of railroad companies. Their validity, in such instances, depends upon considerations of public policy, comity between States and the applicability of federal and State anti-trust statutes.

The advantages of a holding corporation may be enumerated as follows:

1. It furnishes a readily available and effective method of controlling several corporations for a common object. Its uses for this purpose have already been indicated:

2. It may be employed to perpetuate corporate control. Financiers holding the control of corporations may transfer their shares to a holding corporation. Death or disagreement will not then affect the control. In many cases also a holding corporation may take the place of a voting trust — an expedient always of doubtful validity.

3. The holding corporation permits the capitalization of controlling stock interests. The control of a corporation having a capital of twenty million dollars — as an illustration — requires a permanent investment of more than ten million dollars, assuming the stock worth par. If a holding corporation is formed, with a capital equal to the investment, the shares may be transferred to it and forty-nine per cent of its stock sold. The original controlling stockholders, by retaining control of the holding corporation, retain control of the original corporation. Through the formation of a series of holding corporations, it is conceivable that the majority stockholders of a holding corporation of a thousand dollars capital might hold the ultimate control of a corporation of a million dollars capital.

§ 286. **Rights of Foreign Corporation holding Stock.** — The right of a corporation of one State to subscribe for or acquire shares of stock in a corporation of another State depends, primarily, upon the extent of its chartered powers and the laws of the State of its incorporation. If it is without the power in the State of its creation, it is without the power everywhere.

A corporation, having power to subscribe for stock in other

corporations, may exercise the power in another State if the laws of that State permit.¹ In the absence of language clearly including corporations in a grant of power to become incorporators, a foreign corporation could not participate in the formation of a corporation, but its disability would arise from its corporate, and not from its foreign, character. Corporations are not "persons" who are authorized to form corporations;² but, in absence of statutory provision, there is no distinction between residents and non-residents in the right to become incorporators or subscribers.³

A corporation, having power to purchase stock, may purchase the shares of foreign corporations, unless the laws of the State of their creation forbid such acquisition.⁴ In

¹ *Rogers v. Nashville, etc. R. Co.*, 91 Fed. 312 (1898): "It is impossible in the present state of Tennessee legislation to say that this charter power is either opposed to any law or policy of that State. Upon the contrary . . . the special charter . . . expressly invites such ownership by providing that 'any State or any citizen, corporation or company of this or any other State or country may subscribe for and hold stock in said company.'" Compare *Merz Capsule Co. v. United States Capsule Co.*, 67 Fed. 414 (1895).

² *Factors, etc. Ins. Co. v. New Harbor Protection Co.*, 37 La. Ann. 233 (1885); *Denny Hotel Co. v. Schram*, 6 Wash. 134 (1893), (32 Pac. Rep. 1002).

³ *Moxie Nerve Food Co. v. Baumbach*, 32 Fed. 205 (1887); *Commonwealth v. Hemmingway*, 131 Pa. St. 614 (1890), (18 Atl. Rep. 990); *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq. 475 (1879); *Humphreys v. Mooney*, 5 Colo. 282 (1880).

⁴ In *United Lines Tel. Co. v. Boston Safe Deposit, etc. Co.*, 147 U. S. 447 (1892), (13 Sup. Ct. Rep. 396), the Supreme Court of the United States said: "The general power of a corporation to hold property in States other than the one which incorporated it (in the absence of statutory prohibition in such

States), is firmly established. The Bankers Company received the benefit of the August agreement through which alone it acquired control of the Rapid Company; it enjoyed that control, took all the receipts of the Rapid Company's business, profited by the good-will which that company had acquired, and thus obtained a benefit from the August agreement which is beyond its power to restore." See also *Rogers v. Nashville, etc. R. Co.*, 91 Fed. 299 (1898).

Comity between the States will not authorize a foreign corporation to exercise, in relation to stock in a domestic corporation, powers within the State which a domestic corporation would not be permitted to exercise under the constitution and policy of the State. *Clarke v. Central R., etc. Co.*, 50 Fed. 338 (1892). But compare later decision in same case, 62 Fed. 328 (1894).

Under an early Pennsylvania statute prohibiting any foreign corporation from holding any real estate within the State, "directly in the corporate name or by or through any trustee or other device whatever," unless specially authorized by law, it was held that a corporation of another State could not, by purchasing the charter of a mining company, vesting the title to certain land in its name, and then taking the

*Rogers v. Nashville, etc. R. Co.*¹ Judge Lurton, in speaking of the right of a foreign railroad company to purchase stock in a domestic corporation, said: "Such a purchase was not in excess of its chartered power, for the express power was conferred by an amendment of its charter. . . . Comity requires that this charter power shall be recognized as valid if not opposed to some law or policy of the State creating the corporation in which stock has been acquired."

When stock has been lawfully acquired by a foreign corporation, it has all the rights and powers, and is subject to all the liabilities, of other stockholders. The legislature can pass no law impairing the obligation of the contract between it, its fellow stockholders and the corporation, nor can its property be taken without "due process of law." Legislation cannot affect vested rights.

The rights of a foreign corporation within a State are, however, only those which comity between States permits.² The right to issue stock is in itself a franchise. "The power to create corporate capital stock is a legislative function."³ The legislature in granting the power may attach such conditions to its exercise, and to the transfer of shares, as it may deem expedient.⁴ It may enact statutes, having

stock of the mining company, become the owner of the land; and that, in case of acquisition by such means, the land was liable to escheat in proceedings in *quo warranto* under another statute. *Commonwealth v. New York, etc. R. Co.*, 114 Pa. St. 340 (1886), (7 Atl. Rep. 756).

¹ *Rogers v. Nashville, etc. R. Co.*, 91 Fed. 312 (1898).

² In view of the fact that New Jersey, of all the States, is the creator of the "tramp corporation," and derives a large revenue from the issue of charters to corporations to transact business in other States, an early decision as to the *status* of corporations of other States in New Jersey is interesting. In *Hill v. Beach*, 12 N. J. Eq. 31 (1858), it was said of a New York corporation: "[It] cannot be recognized by any

court in New Jersey as a legally constituted corporation nor be dealt with as such. If it can be, what need is there of any general or special law in our State? Individuals desirous of carrying on any manufacturing business, may go into the city of New York, organize under the general laws of that State, erect all their manufacturing establishments here, and, under their assumed name, transact their business, not only free from all personal responsibility, but under cover of a corporation not amenable to our laws."

³ *Cooke v. Marshall*, 191 Pa. St. 320 (1899), (43 Atl. Rep. 314), (on rehearing, 196 Pa. St. 200 (1900), (46 Atl. Rep. 447). See also *Railway Co. v. Allerton*, 18 Wall. (U. S.) 233 (1873).

⁴ In *Commonwealth v. Standard Oil Co.*, 101 Pa. St. 119 (1882), an Ohio cor-

a prospective application, forbidding foreign corporations becoming, directly or indirectly, stockholders in domestic companies. It seems, moreover, upon principle, that while the legislature cannot destroy vested rights it may, under an unconditional reservation of power to repeal charters, repeal the charter of a domestic corporation, on the ground that its stock is held by a foreign corporation, and that it is controlled in a manner or for objects contrary to the policy of the State.¹ In such a case, the right of the corporation, as stockholder, to its share of the assets would be preserved.²

The holding by foreign corporations of the stock of domestic companies, for the purpose of destroying competition, is inimical to public policy and, consequently, void. But, in such a case, the unlawful purpose is the essential objection rather than the foreign domicil of the corporation, however much the latter fact, in the opinion of the court, may tend to aggravate the evil.³

These general principles, applicable to all foreign corporations holding stock in domestic companies, apply with equal force to foreign holding corporations, distinctively speaking. Holding corporations may acquire shares in corporations of other States unless the laws or policy of those States forbid. They cannot be used as a cover for evading

poration owned shares of stock in Pennsylvania corporations, but never received any special authority to transact business in Pennsylvania. It was held that the ownership of shares in Pennsylvania corporations did not constitute "doing of business" in the commonwealth, so as to subject the corporation to taxation under an act requiring foreign corporations "doing business in this commonwealth" to pay a tax upon their capital stock.

¹ For consideration of general principle see *Spring Valley Water Works v. Schlottler*, 110 U. S. 347 (1884), (4 Sup. Ct. Rep. 48); *Greenwood v. Freight Co.*, 105 U. S. 13 (1881); *Sinking Fund Cases*, 99 U. S. 700 (1878); *Shields v. Ohio*, 95 U. S. 319 (1877).

² *Greenwood v. Freight Co.*, 105 U. S. 19 (1881).

³ In *Marble Co. v. Harvey*, 92 Tenn. 119 (1892), (20 S. W. Rep. 427), Judge Lurton said: "The purpose and intent in granting a charter is, that the corporation shall carry on its business through its own agents, and not through the agency of another corporation. The public policy of this State will not permit the control of one corporation by another. Especially is this true where a foreign corporation thus undertakes to control and swallow up a domestic company. Such control of one corporation by another in a like business is unlawful, as tending to monopoly. The result is, that this purchase of shares for the express object of con-

those laws, or for the accomplishment of purposes contrary to public policy.¹

§ 287. **Incidents of Ownership attach to Intra Vires Holdings.** — A corporation, acting within the scope of its powers in acquiring the shares of other corporations, is entitled to all the privileges, and is subject to all the obligations, of a natural person as owner.

The right to vote is an incident to the ownership of stock, and whenever a corporation has power—express or implied—to take title to shares of stock, it has the right, so long as it retains them, to exercise the voting power,—through an authorized agent,—upon which their value may depend.² All dividends declared upon the shares it holds belong to it, and it is entitled to have the stock transferred to its name upon the books of the corporation in which it is held.³

A corporation is liable for calls upon its authorized subscription contracts; and, as a stockholder, is subject to all the obligations of other stockholders, and is bound to pay all

trolling and managing another corporation was *ultra vires*, and, therefore, unlawful and void.”

¹ In *Empire Mills v. Alston Grocery Co.* (Tex. App. 1891), 15 S. W. Rep. 506, the Court said: “No rule of comity will allow one State to charter corporations to operate in another State, unless there is a willingness on the part of the foreign State that it should do so. To hold otherwise would be to say that the right of one State, aided by comity, is superior to the sovereign will of the other. This involves the surrender of sovereignty to a rule of comity and to a matter of international etiquette, which no independent nationality should for a moment think of doing.”

² *Rogers v. Nashville, etc. R. Co.*, 91 Fed. 312 (1898); *Matthews v. Murchison*, 17 Fed. 760 (1888); *Davis v. United States Electric Power, etc. Co.*, 77 Md. 35 (1893), (25 Atl. Rep. 982); *Market St. R. Co. v. Hellman*, 109 Cal. 571 (1895), (42 Pac. Rep. 225); *State v. Rohlfis* (N. J. 1890), 19 Atl. Rep.

1099; *Oelberman v. New York, etc. R. Co.*, 77 Hun (N. Y.), 332 (1894), (29 N. Y. Supp. 545). That a *municipal* corporation, holding stock, may vote upon it as any other stockholder, see *Hancock v. Louisville, etc. R. Co.*, 145 U. S. 409 (1892), (12 Sup. Ct. Rep. 969).

In *State v. Newman*, 51 La. Ann. 833 (1899), (25 So. Rep. 408), it was held that, even if a corporation had implied power to acquire and hold stock in another corporation, its right was that of “imperfect ownership”—including the right to enjoy and dispose of the shares, but not the right to vote them.

The phrase “imperfect ownership” aptly describes the rights of a corporation in respect of its *ultra vires* holdings, but when a corporation *has* power—express or implied—to hold stock, it necessarily must have the right to exercise the privilege which may give the stock its greatest value.

³ *Royal Bank of India's Case*, L. R. 4 Ch. App. 252 (1869).

assessments lawfully made against its *intra vires* holdings of shares.¹ Its liability as a stockholder, for assessments for the benefit of creditors, is not affected by the fact that while it appears upon the stock books *as owner* it is, in reality, only a pledgee.² Nor will a merely colorable transfer relieve it from responsibility.³

II. *Ultra Vires Holdings.*

§ 288. **What Incidents of Ownership attach to Ultra Vires Holdings.** — When a corporation, without authority, purchases the shares of another corporation, the law recognizes a limited right of ownership therein. Otherwise, the purchase would involve a forfeiture of the consideration paid for the stock. A corporation is entitled to receive the dividends declared upon its *ultra vires* holdings, and has a right to sell and dispose of such shares.⁴

Such a corporation, however, is not entitled to participate

¹ *National Bank v. Case*, 99 U. S. 628 (1878); *Calumet Paper Co. v. Stotts Invest. Co.*, 96 Iowa, 147 (1895), (64 N. W. Rep. 782); *Smith v. Newark, etc. R. Co.*, 8 Ohio Cir. Ct. Rep. 583 (1894); *Royal Bank of India's Case*, L. R. 4 Ch. App. 252 (1869).

² *National Bank v. Case*, 99 U. S. 631 (1878): "It is thoroughly established that one to whom stock has been transferred in pledge, or as collateral security for money loaned, and who appears on the books of the corporation as the owner of the stock, is liable as a stockholder for the benefit of creditors." See also *Pauly v. State Loan, etc. Co.*, 165 U. S. 606 (1897), (17 Sup. Ct. Rep. 465); *Pullman v. Upton*, 96 U. S. 328 (1877); *National Foundry, etc. Works v. Oconto Water Co.*, 68 Fed. 1006 (1895); *Ball Electric Light Co. v. Child*, 68 Conn. 522 (1897), (37 Atl. Rep. 391); *Calumet Paper Co. v. Stotts Invest. Co.*, 96 Iowa, 147 (1895), (64 N. W. Rep. 782); *Royal Bank of India's Case*, L. R. 4 Ch. App. 252 (1869).

A pledgee is not, however, personally liable as a stockholder when the

stock stands in his name "as pledgee," or where he is registered as holding it as collateral. *Pauly v. State Loan, etc. Co.*, 165 U. S. 606 (1897), (17 Sup. Ct. Rep. 465); *Beal v. Essex Savings Bank*, 67 Fed. 816 (1895).

³ *National Bank v. Case*, 99 U. S. 628 (1878); *Bowden v. Johnson*, 107 U. S. 251 (1882), (2 Sup. Ct. Rep. 246).

But the pledgee, for the avowed purpose of avoiding individual liability, may take the security, in the first place, in the name of an irresponsible trustee. *Anderson v. Philadelphia Warehouse Co.*, 111 U. S. 479 (1883), (4 Sup. Ct. Rep. 525); also *Pauly v. State Loan, etc. Co.*, 165 U. S. 606 (1897), (17 Sup. Ct. Rep. 465).

⁴ *Milbank v. New York, etc. R. Co.*, 64 How. Pr. 20 (1882); *State v. Newman*, 51 La. Ann. 833 (1899), (25 So. Rep. 408).

Where one corporation acquires stock in another company, and the contract is fully executed, the latter cannot set up the defence of *ultra vires* to an action for the recovery of dividends. *Bigbee, etc. Packet Co. v. Moore*, 121 Ala. 379 (1898), (25 So. Rep. 602).

in the control and management of the corporation in which it so acquires stock. It is not entitled to vote, and other stockholders may enjoin it from voting should it attempt to do so.¹

It has also been held that a corporation acquiring, without authority, stock in another corporation cannot compel the latter corporation to transfer the shares upon the stock books so as to give it the *status* and privileges of a stockholder of record.²

§ 289. **Liability for Assessments upon Ultra Vires Holdings.** — When a subscription by one corporation for stock in another is without authority, it is void, and the corporation is not liable for calls or assessments made upon stockholders, because it is not a stockholder.³ Upon similar principles, a corporation which purchases, or otherwise acquires, shares of another corporation cannot be assessed or held liable as a stockholder, when, in taking the stock, it acted beyond its powers.⁴ Rights are not gained nor obligations incurred by *ultra vires* acts.

A distinction has, however, been drawn between cases where

¹ *Milbank v. New York, etc. R. Co.*, 64 How. Pr. 20 (1882); *State v. Newman*, 51 La. Ann. 833 (1899), (25 So. Rep. 408).

In *State v. McDaniel*, 22 Ohio St. 354 (1872), there is a *dictum* to the effect that a railroad company acquiring, without authority, bonds of another railroad company having voting power, cannot vote them.

² *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350 (1881), (38 Am. Rep. 594). While this decision is undoubtedly correct upon the point stated, it is manifestly erroneous in the *dictum* that the taking of shares by way of pledge is *ultra vires*. See ante, § 278: "*Incidental Power to take Stock as Collateral.*"

³ *Peshtigo Co. v. Great Western Tel. Co.*, 50 Ill. App. 624 (1893); *Pauly v. Coronado Beach Co.*, 56 Fed. 428 (1893).

A lien of a corporation on its stock,

for debts due from its stockholders, does not attach to the *ultra vires* holdings of another corporation. *Lanier Lumber Co. v. Rees*, 103 Ala. 622 (1894), (16 So. Rep. 637).

⁴ *California Bank v. Kennedy*, 167 U. S. 362 (1897), (17 Sup. Ct. Rep. 831). In *Ex parte British Nation Life Assurance Ass'n*, L. R. 8 Ch. 679 (1878), the Court of Appeal dismissed an order putting a life association on the list of contributories to a corporation in liquidation because certain shares of such corporation had been transferred to it. Lord Justice James held that, while the association was empowered to purchase for investment, shares of a certain character, it was not empowered to purchase stock which would practically constitute it a partner in a business venture, and that the transfer of the stock in question into the name of the association was *ultra vires* and void.

the acquisition of stock is wholly beyond the powers of the corporation and cases where it is only partially so. Thus, it has been held that the fact that a corporation *might*, under certain circumstances, have acquired stock in another corporation, renders its purchase, for any other purpose, merely the unauthorized exercise of an existing power and estops it, when the corporation becomes insolvent, from setting up the defence of *ultra vires* to an action to enforce an assessment upon the stock.¹ Such an exception is, however, as broad as the rule, for there are circumstances under which every corporation, unless expressly prohibited, may acquire stock. The distinction is not well founded upon principle and is opposed to the latest decisions of the Supreme Court of the United States.

In *California Bank v. Kennedy*² Mr. Justice White said:

¹ A State bank having, under its charter, power to accept stock in a national bank as security for a loan, but without power to purchase such stock as an investment, purchased stock in a national bank, which was transferred to its name. The latter bank subsequently became insolvent, and an assessment upon the stockholders was made by a comptroller of the currency, payment of which was resisted by the State bank on the ground that the purchase was *ultra vires*. It was held that, as the purchase of stock was merely the exercise, for an unauthorized purpose, of a power existing for a legitimate purpose, such defence was not available. *Citizens State Bank v. Hawkins*, 71 Fed. 369 (1896).

In *First National Bank v. Hawkins*, 79 Fed. 51 (1897), it was held that a national bank, which had purchased shares of stock in another national bank as an investment, and which appeared on the books of the latter bank as a stockholder, was estopped, after the insolvency of the latter, from denying liability for an assessment on the stock, on the ground that its purchase was *ultra vires*. The decision in this case was rendered a few weeks be-

fore the decision of the Supreme Court of the United States, in *California Bank v. Kennedy*, 167 U. S. 362 (1897), (17 Sup. Ct. Rep. 831), *infra*. A petition for rehearing, based upon this decision, was thereupon filed, but was denied by Judge Putnam, who said (*First National Bank v. Hawkins*, 82 Fed. 301 (1897)): "The issue considered by the Supreme Court was the liability of a national bank as a stockholder in a State savings bank, while the question before us was as to its liability as a stockholder in another national bank. The question discussed by the Supreme Court was more largely that of *ultra vires* than that of the policy of the statutes relating to national banking associations, and its line of decisions, which we understood to bind us in the case at bar, were not particularly noticed by it. Therefore it does not follow beyond question that *Bank v. Kennedy* is decisive of the case at bar. Inasmuch as the defendant in error has undoubted means of relief by a writ of error, we, under the circumstances, are of the opinion that the petition should be denied."

² *California Bank v. Kennedy*, 167 U. S. 367 (1897), (17 Sup. Ct. Rep. 831), reversing *Kennedy v. California Sav.*

*“The transfer of the stock in question to the bank being unauthorized by law, does the fact that, under some circumstances, the bank might have legally acquired stock in the corporation, estop the bank from setting up the illegality of the transaction? Whatever divergence of opinion may arise on this question from conflicting adjudications in some of the State courts, in this Court it is settled in favor of the right of the corporation to plead its want of power, that is to say, to assert the nullity of an act which is an *ultra vires* act. . . . The power to purchase or deal in stocks of another corporation, as we have said, is not expressly conferred upon national banks, nor is it an act which may be exercised as incidental to the powers expressly conferred. A dealing in stocks is, consequently, an *ultra vires* act. Being such, it is without efficacy. . . . Stock so acquired creates no liability to the creditors of the corporation whose stock was attempted to be transferred.”*

§ 290. **Ultra Vires Contracts for Purchase of Stock — Collateral Contracts.** — A contract entered into by a corporation for the purchase of stock in another corporation, which it has no authority to acquire, is invalid. No recovery can be had upon it and the defence of *ultra vires* is equally available to the corporation and to the other contracting party.¹

Contracts collateral to, and dependent upon, an *ultra vires* contract for the purchase of stock cannot be enforced.² Thus, where a corporation purchased stock in another company and the vendor, as a part of the consideration, agreed to assume certain indebtedness of the corporation whose stock was transferred, it was held that an action upon this agreement

Bank, 101 Cal. 495 (1893), (35 Pac. Rep. 1039).

¹ *De la Vergne Refrigerating Mach. Co. v. German Savings Inst.*, 175 U. S. 40 (1899), (20 Sup. Ct. Rep. 20).

² *Marble Co. v. Harvey*, 92 Tenn. 115 (1892), (20 S. W. Rep. 427, 36 Am. St. Rep. 71).

An agreement between the officers of a bank and the maker of a note payable to it, that the note may be paid

by the transfer to the bank of stock of another bank, is illegal. *Tillinghast v. Carr*, 82 Fed. 298 (1897).

Where an *ultra vires* contract for the purchase of stock by a corporation has been executed, and a note given in payment, equity will not intervene to cancel the agreement, but will leave the corporation to its legal defence to the note. *Cincinnati, etc. R. Co. v. McKeen*, 64 Fed. 36 (1894).

was in furtherance of the original unlawful contract and could not be sustained.¹

§ 291. **Independent Contracts.** — Although a contract by one corporation to purchase stock in another is *ultra vires* and cannot be enforced between the parties, yet when it has been executed, and negotiable instruments have been given in payment of the purchase price, a *bona fide* holder for value, without notice of the illegality, may collect them from the corporation.² But such a holder has only the right to demand payment of his note, and has no standing to compel the rescission of the contract of purchase, on the ground that it was *ultra vires*.³

¹ *Marble Co. v. Harvey*, 92 Tenn. 115 (1892), (20 S. W. Rep. 427, 36 Am. St. Rep. 71). In this case Judge Lurton, after referring to cases where *ultra vires* had not been permitted as a defence, or as a ground for collateral attack, said: "The question here is not like any of these. The complainant sues upon its contract, and, in affirmation of it, seeks to have the defendant perform an arrangement which sprung from and was collateral to it. It has received the shares it purchased, and holds onto them. It simply asks that the defendant be further compelled to perform his contract by contributing, in accordance with his agreement, his proportion of the liability paid off by the complainant in protection of the property of the McMillan Marble Company. The suit is clearly in furtherance of the original unlawful and void contract. That the contract has been executed by the plaintiff does not make it lawful or entitle it to an enforcement of it." The judge then referred at length to *Pittsburgh, etc. R. Co. v. Keokuk, etc. Bridge Co.*, 131 U. S. 389 (1889), (9 Sup. Ct. Rep. 770), and *Central Transportation Co. v. Pullman Car Co.*, 139 U. S. 24 (1891), (11 Sup. Ct. Rep. 478), and continued (p. 124): "To sustain this suit, as now presented, would be in affirmation and furtherance of an unlawful and void contract. It is, in no sense, a suit in dis-

affirmance. Whether complainant could tender back the shares received, and maintain a suit to recover the money paid for the shares upon an implied agreement to return money which the defendant had no right to retain, is a question not presented upon this record."

² In *Woodcock v. First National Bank*, 113 Mich. 236 (1897), (71 N. W. Rep. 477), where a note and mortgage had been given in payment for an *ultra vires* purchase of stock, the Supreme Court of Michigan said: "If the complainant was not aware of an infirmity in these securities in the hands of the First National Bank, as the paper was not dishonored when received by complainant, and was negotiated by the officers of the gas light company, the security could not be defeated in complainant's hands."

In *Wright v. Pipe Line Co.*, 101 Pa. St. 204 (1882), (47 Am. Rep. 701), where a corporation, although prohibited by its charter, entered into a contract for the purchase of stock in another corporation, which was executed and a note given in payment, which was acquired by a *bona fide* purchaser for value, but with knowledge of the character of the consideration, it was held that the corporation could not set up the defence of *ultra vires* to the note.

³ *Woodcock v. First National Bank*,

Independent contracts made by a corporation, although relating to stock held without authority, are not necessarily tainted with the original illegality. It does not follow that it is illegal to dispose of stock because it was unlawful to acquire it in the first instance.¹ Upon this principle, it has been held that a purchaser of stock from a corporation, giving a note in payment therefor, cannot set up *ultra vires* as a defence to an action upon the note. In *Holmes, etc. Manufacturing Co. v. Holmes, etc. Metal Co.* the Court of Appeals of New York said:² "The contract under which the note in suit was given was made . . . nearly four years after the plaintiff became the owner of the stock. No claim is made that that contract is, for any reason, illegal or void. Numerous cases are found in which the courts have refused to execute contracts that were *ultra vires*, but this action is not based upon such contract. . . . To hold that the plaintiff could not dispose of the stock would deprive it of the consideration received for the transfer of its rolling mill and material, thus accomplishing a wrong and not advancing justice."

§ 292. **Holding Stock to prevent Competition.** — While the purchase of stock in any other corporation is beyond the general powers of a corporation, the purchase of stock in a competing corporation, in order to prevent competition, is not only *ultra vires* but is contrary to public policy.³

113 Mich. 236 (1897), (71 N. W. Rep. 477).

¹ *Bigbee, etc. Packet Co. v. Moore*, 121 Ala. 379 (1898), (25 So. Rep. 602). In this case it was held that it was immaterial in a suit by a *transferee* of stock that the transferrer — a corporation — acted beyond its powers in acquiring the stock.

A corporation having sold its property and received the purchasing corporation's stock in payment, cannot be enjoined by the latter from transferring the stock. *American Water Works Co. v. Venner*, 63 Hun, 632 (1892), (18 N. Y. Supp. 379).

² *Holmes, etc. Mfg. Co. v. Holmes, etc. Metal Co.*, 127 N. Y. 260 (1891), (27 N. E. Rep. 831).

³ *United States: Louisville, etc. R. Co. v. Kentucky*, 161 U. S. 698 (1896), (16 Sup. Ct. Rep. 714): "Not only is the purchase of stock in another company beyond the power of a railroad corporation in the absence of an express stipulation in the charter, but the purchase of such stock in a rival and competing line is held to be contrary to public policy and void." See also *McCutcheon v. Merz Capsule Co.*, 71 Fed. 787 (1896).

Georgia: Central, etc. R. Co. v. Collins, 40 Ga. 582 (1869); *Hazlehurst v. Savannah, etc. R. Co.*, 43 Ga. 13 (1871).

Illinois: People v. Chicago Gas Trust Co., 130 Ill. 268 (1889), (22 N. E. Rep. 798, 17 Am. St. Rep. 319). This is the leading case upon the subject.

The rule of public policy is not to be evaded by indirection. The fact that stock is purchased by a non-competing corporation in its own name, but for the benefit of a competing company, does not affect its application.¹

This subject is considered at length in the following part of this treatise.²

§ 293. **Remedies in Case of Ultra Vires Stockholding.** — Every stockholder in a corporation may stand upon his rights as secured by the contract of association. He cannot be forced into an outside enterprise, and may insist that the funds of the corporation shall be used only for the purposes permitted by its charter and the laws governing it.

Upon these principles, any stockholder in a corporation proposing, without authority, to purchase stock in another corporation, may enjoin the purchase;³ and it has been held that the fact that he obtains his stock after the passage of the resolution authorizing the purchase, and with the purpose of preventing its consummation, makes no difference.⁴ It does not, however, follow, conversely to this proposition, that a stockholder in the corporation whose stock is acquired by another company can raise the objection of *ultra vires*. The purchase is beyond the powers, not of his corporation but of the purchaser.⁵

New Hampshire: *Pearson v. Concord R. Corp.*, 62 N. H. 537 (1883).

New Jersey: *Elkins v. Camden, etc. R. Co.*, 36 N. J. Eq. 5 (1882).

Pennsylvania: *Pennsylvania R. Co. v. Commonwealth* (Pa. 1886), 7 Atl. Rep. 374.

Tennessee: *Marble Co. v. Harvey*, 92 Tenn. 115 (1892), (20 S. W. Rep. 427, 36 Am. St. Rep. 71).

¹ *Pennsylvania R. Co. v. Commonwealth* (Pa. 1886), 7 Atl. Rep. 374.

² *Post*, Part V: "*Combinations of Corporations*."

³ *Central, etc. R. Co. v. Collins*, 40 Ga. 582 (1869); *Memphis, etc. R. Co. v. Wood*, 88 Ala. 630 (1889), (7 So. Rep. 108); *Elkins v. Camden, etc. R. Co.*, 36 N. J. Eq. 5 (1882); *Solomons v. Laing*, 12 Beav. 339 (1849).

⁴ In *Elkins v. Camden, etc. R. Co.*, 36 N. J. Eq. 5 (1882), the directors of a railroad company, without any statutory authority, passed a resolution to buy the stock of a competing road, and it was held:

(A) That the proposed purchase was *ultra vires*, and hence could not be executed if ratified by stockholders.

(B) That it was void and against public policy, in that its object was to prevent lawful competition.

(C) That it could be enjoined upon application of a single stockholder of the purchasing company, and the fact that he obtained his stock after the passage of the resolution, and with avowed design of preventing its consummation, made no difference.

⁵ *Oelbermann v. New York, etc. R.*

The laches of a stockholder in taking steps to prevent the *ultra vires* holding by his corporation of stock in another company may bar him from relief in equity.¹

The State may institute proceedings to prevent corporations from exceeding their chartered powers in purchasing shares in other companies. This is especially true in the case of corporations serving public purposes. An injunction may be granted in behalf of the State to restrain an unlawful acquisition or holding of stock;² and proceedings in *quo warranto* will lie against the corporation usurping the power.³

CHAPTER XXVII.

CONTROL OF ONE CORPORATION BY ANOTHER.

- § 294. Meaning of Term "Control."
- § 295. Distinction between Control of Corporation and Control of its Property.
- § 296. Distinction between Control and Community of Interest.
- § 297. Distinction between Control and Consolidation.
- § 298. Power to purchase Stock to obtain Control.
- § 299. Status of Corporation as Controlling Stockholder.
- § 300. Trust Relation of Controlling Corporation to Minority Stockholders.
- § 301. Remedies of Minority Stockholders of Controlled Corporation.

§ 294. Meaning of Term "Control." — The control of a corporation has two phases. The ultimate power of control

Co., 77 Hun (N. Y.), 332 (1894), (29 N. Y. Supp. 545).

¹ Alexander v. Searcy, 81 Ga. 536 (1888), (8 S. E. Rep. 630).

A purchase of stock in a corporation, with knowledge that it assumes and exercises the power to hold stock in other corporations, may amount to an implied recognition of the assumed power. Venner v. Atchison, etc. R. Co., 28 Fed. 581 (1886). This decision is contrary to sound principle. Laches may bar a stockholder in equity, but his recognition of, or acquiescence in, an *ultra vires* act cannot validate it.

In a suit in equity by a stockholder

to set aside an *ultra vires* purchase of stock made by the directors nine years before, it was held that the complainant was guilty of laches, and, therefore, was not entitled to relief. Cullen v. Coal Creek, etc. R. Co. (Tenn. 1897), 42 S. W. Rep. 693.

² Pennsylvania R. Co. v. Commonwealth (Pa. 1886), 7 Atl. Rep. 368.

Delay does not affect the right of the State to prevent an *ultra vires* holding of stock. Alexander v. Searcy, 81 Ga. 536 (1888), (8 S. E. Rep. 630).

³ People v. Chicago Gas Trust Co., 130 Ill. 268 (1889), (22 N. E. Rep. 798, 17 Am. St. Rep. 319).

always lies in the stockholders. They determine, directly, matters of fundamental importance. They provide, through the election of directors, for the corporate management, and may thereby settle the corporate policy. The immediate power of control lies in the directors and officers appointed to manage the affairs of the corporation.¹

The term control, as applied to a corporation in its relations with other corporations—as distinguished from its internal management—refers to the ultimate power of control and means, specifically, the ownership of a *controlling interest* in a corporation. A corporation which owns a majority of the shares of the capital stock of another corporation controls it.²

§ 295. **Distinction between Control of Corporation and Control of its Property.**—A distinction, analogous to that between the ultimate and immediate control of the affairs of a corporation, exists between the control, by a corporation, of its property, and the control, by majority stockholders, of the corporation.

The owner of shares in a corporation does not own the corporate property. The holders of controlling stock interests control the corporation, the corporation controls its property.³ In *Pullman Car Co. v. Missouri Pacific R.*

¹ In *Pullman Car Co. v. Missouri Pac. R. Co.*, 11 Fed. 636 (1882), (*affirmed* 115 U. S. 587 (1885), (6 Sup. Ct. Rep. 194)), Judge McCrary said: "What are we to understand by the word 'control' as employed in the contract? The language is, 'all roads which it controls or may hereafter control,' which in our judgment means controlled by the corporation. The language does not refer to the ultimate power of control which always lies in the stockholders, and which may be indirectly exercised by them at stated periods by the election of directors. It means the immediate or executive control which is exercised by the officers and agents chosen by and acting under the direction of the board of directors."

² *Jessup v. Illinois Cent. R. Co.*, 36 Fed. 741 (1888): "The bill charges that the Illinois Central Railroad Company has obtained control of the stock of the Dubuque and Sioux City Railroad Company. This allegation, upon the familiar rule that statements of this character will be taken most strongly against the pleader, only implies that the Illinois Central Railroad Company has obtained a majority of the stock of the Dubuque & Sioux City Railroad Company."

³ *Pullman Car Co. v. Missouri Pac. R. Co.*, 115 U. S. 587 (1885), (6 Sup. Ct. Rep. 194), *affirming* 11 Fed. 636 (1882).

In *Fitzgerald v. Missouri Pac. R. Co.*, 45 Fed. 818 (1891), Judge Caldwell said: "The owner of all the stock

Co.¹ Mr. Chief Justice Waite said: "It has all the advantages of the control of the road, but that is not, in law, the control itself. Practically it may control the company, but the company alone controls its road. In a sense, the stockholders of a corporation own its property, but they are not the managers of its business or in the immediate control of its affairs."²

§ 296. **Distinction between Control and Community of Interest.** — The phrase, "community of interest," as used in relation to corporations, especially railroad companies, means the acquisition and holding for a *common purpose*, by several corporations, of stock in other corporations; or the mutual holding by two or more corporations of each other's shares. The "community of interest idea," with reference to railroads, is that competing railroad companies, having common stockholders or owning each other's shares, will maintain rates; that the practical pooling of interests will more than fill the

and bonds of a corporation does not own the corporate property. The corporate property, which includes all rights of action and claims for damages, belongs to the corporation, and is subject to the management and control of its board of directors." See also *Jessup v. Illinois Cent. R. Co.*, 36 Fed. 741 (1888).

¹ *Pullman Car Co. v. Missouri Pac. R. Co.*, 115 U. S. 597 (1885), (6 Sup. Ct. Rep. 194). In this case, a railroad company made a contract concerning all roads which it did then or might thereafter "control." It afterwards acquired a majority of the stock of another railroad company, and the question was whether it thereby controlled the road of that company within the meaning of the contract. The Court held that it did not.

² In *Pennsylvania R. Co. v. Commonwealth* (Pa. 1886), 7 Atl. Rep. 368, a case involving the construction of the Pennsylvania constitutional provision (Art. 17, § 4), against the acquisition by railroad corporations of the control of competing companies, the Court said

with reference to the case of *Pullman Car Co. v. Missouri Pac. R. Co.*, *supra*: "The decision of the question of control was not called for in the case, which was already decided on another and a fundamental point. But, waiving this, the point decided is, merely, that the ownership of the stock does not necessarily give control of the road. The Chief Justice says, speaking of the stockholding company: 'Practically, it may control the company, but the company alone controls its road.' . . . This distinction seems very narrow, but it is certainly involved in the conclusion reached, which cannot stand unless it is recognized: for it is too plain to bear argument, that the ownership of the stock of a corporation carries with it the control of the corporation. Indeed, this is merely a different way of stating the truism, that a corporation is controlled by its stockholders. That they do it through the agency of a board of directors and other officers does not alter the fact."

place of the prohibited pooling of traffic or earnings, and prevent traffic wars and ruinous competition.

The element of control is not essential to a community of interest, and the one does not necessarily imply the other. "It may be true that the two companies are acting in harmony, and that the same persons own a majority of the stock of both; but that is something very different from the control of one by the other."¹

§ 297. **Distinction between Control and Consolidation.**—The distinction between the union of stockholders and properties effected by consolidation and the continued separate existence of the corporations, controlled and controlling, has already been pointed out.²

§ 298. **Power to purchase Stock to obtain Control.**—A corporation having power to purchase shares may exercise the power for the purpose of obtaining control of another corporation and of participating in its management. A corporation, without such express authority, cannot purchase for control.³

In *De la Vergne Refrigerating Mach. Co. v. German Savings Inst.* Mr. Justice Brown said:⁴ "As the powers of corporations, created by legislative act, are limited to such as the act expressly confers and the enumeration of these implies the exclusion of all others, it follows that, unless express

¹ *Pullman Car Co. v. Missouri Pac. R. Co.*, 11 Fed. 637 (1882), *affirmed* 115 U. S. 587 (1885), (6 Sup. Ct. Rep. 194).

² See *ante*, § 12: "Distinction between Consolidation and Control."

³ *United States: De la Vergne Refrigerating Mach. Co. v. German Savings Inst.*, 175 U. S. 54 (1899), (20 Sup. Ct. Rep. 20); *Louisville, etc. R. Co. v. Kentucky*, 161 U. S. 698 (1896), (16 Sup. Ct. Rep. 714); *Nashua, etc. R. Co. v. Boston, etc. R. Co.*, 136 U. S. 385 (1890), (10 Sup. Ct. Rep. 1004); *Tod v. Kentucky Union Land Co.*, 57 Fed. 58 (1893).

Illinois: Martin v. Ohio Stove Co., 78 Ill. App. 105 (1898).

New Hampshire: Pearson v. Con-

cord R. Corp., 62 N. H. 548 (1883): "A corporation cannot become a stockholder in another corporation unless such power is given to it by its charter, or is necessarily implied in it, especially if the purchase be for the purpose of controlling or affecting the management of the other corporation."

New Jersey: Elkins v. Camden, etc. R. Co., 36 N. J. Eq. 5 (1882).

Ohio: One railroad company has no power to acquire the bonds of another corporation in order to control the elections of the latter, such bonds having a voting power. State v. McDaniel, 22 Ohio St. 368 (1872).

⁴ *De la Vergne Refrigerating Mach. Co. v. German Savings Inst.*, 175 U. S. 54 (1899), (20 Sup. Ct. Rep. 20).

provision is given to do so, it is not within the general powers of a corporation to purchase the stock of other corporations for the purpose of controlling their management."

As already pointed out, however, the rule is broader than stated in this opinion. A purchase for control, without express statutory authority, is *ultra vires*; but it does not follow that a purchase for other purposes is *intra vires*. No purchase by a corporation of shares in another company, for any purpose, is valid, unless made in the exercise of an express power, or of a power necessarily incidental thereto. But there can never be an implied power to purchase for control.¹

§ 299. **Status of Corporation as Controlling Stockholder.** — There is nothing in the nature of a corporation which forbids it exercising control of another corporation, if power to acquire control is conferred.²

When a corporation acquires control of another corporation its rights, in law, are the same as those of any natural person holding control. The two corporations continue to exist as before and each acts through its own directors and officers.³ They are legally distinct, although acting together for a common purpose and managed in a common interest.

§ 300. **Trust Relation of Controlling Corporation to Minority Stockholders.** — When a majority of the stock of one corporation is owned by another, which thereby acquires the right to control its management, the controlling corporation assumes a relation of trust towards the minority stockholders of the corporation controlled, and is under an obligation to manage its affairs for the benefit of *all* the stockholders and not for

¹ "While this power [to purchase shares] may be incidental to some undisputed authority its exercise can never be sustained as an incidental power when the object is to obtain the control and management of another corporation." Editorial note to *Denny Hotel Co. v. Schram*, 36 Am. St. Rep. 137.

² *Citizens State Bank v. Hawkins*, 71 Fed. 369 (1896); *Matthews v. Mur-*

chison, 17 Fed. 760 (1883); *Market Street R. Co. v. Hellman*, 109 Cal. 571 (1895), (42 Pac. Rep. 225); *White v. Syracuse, etc. R. Co.*, 14 Barb. (N. Y.) 559 (1853).

³ *Pullman Car Co. v. Missouri Pac. R. Co.*, 11 Fed. 637 (1882), *affirmed* 115 U. S. 597 (1885), (6 Sup. Ct. Rep. 194); *Jessup v. Illinois Cent. R. Co.*, 36 Fed. 735 (1888).

its own aggrandisement.¹ This is merely an application of the principle that, while a majority of the stockholders may legally control the corporation's business, they assume the correlative duty of good faith, and cannot manipulate such business in their own interest to the injury of minority stockholders.²

In *Farmers Loan, etc. Co. v. New York, etc. R. Co.*³ Judge Martin, after considering a number of cases illustrating the general principle, said: "While the question in some of the cases cited arose between stockholders and the directors and officers of a company, who, as such, held a position of trust as to the former, still, where, as in this case, a majority of the stock is owned by a corporation or combination of individuals, and it assumes the control of another company's business and affairs through its control of the officers and directors of the corporation, it would seem that, for all practical purposes, it becomes the corporation of which it holds a majority of the stock, and assumes the same trust relation towards the minority stockholders that a corporation itself usually bears to its stockholders. . . . The principle of these authorities renders it quite obvious that a corporation, purchasing a majority of the stock of a competing one, cannot obtain control of its affairs, divert the income of its business, refuse business which would enable the defaulting company to pay its interest, and then institute

¹ *Farmers Loan, etc. Co. v. New York, etc. R. Co.*, 150 N. Y. 410 (1896), (44 N. E. Rep. 1043); *Barr v. New York, etc. R. Co.*, 96 N. Y. 444 (1884); *George v. Central R., etc. Co.*, 101 Ala. 607 (1893), (14 So. Rep. 752); *Davis v. United States Electric Power, etc. Co.*, 77 Md. 35 (1893), (25 Atl. Rep. 982); *Goodin v. Cincinnati, etc. Canal Co.*, 18 Ohio St. 169 (1868); *Pearson v. Concord R. Corp.*, 62 N. H. 537 (1883).

² *United States: Ervin v. Oregon R., etc. Co.*, 27 Fed. 630 (1886); *Meeker v. Winthrop Iron Co.*, 17 Fed. 48 (1883). See also *Jackson v. Ludeling*, 21 Wall. 616 (1874). Compare *Rogers v. Nashville, etc. R. Co.*, 91 Fed. 312 (1898).

California: Wright v. Orville Mining Co., 40 Cal. 20 (1870).

New York: Gamble v. Queens County Water Co., 123 N. Y. 91 (1890), (25 N. E. Rep. 201); *Sage v. Culver*, 147 N. Y. 241 (1895), (41 N. E. Rep. 513); *Pondir v. New York, etc. R. Co.*, 72 Hun, 384 (1893), (25 N. Y. Supp. 560); *Meyer v. Staten Island R. Co.*, 7 N. Y. St. Rep. 245 (1887).

England: Menier v. Hooper's Telegraph Works, L. R. 9 Ch. App. 350 (1874); *Gregory v. Patchett*, 33 Beav. 595 (1864).

³ *Farmers Loan, etc. Co. v. New York, etc. R. Co.*, 150 N. Y. 430 (1896), (44 N. E. Rep. 1043).

an action in equity to enforce its obligations, for the avowed purpose of obtaining entire control of its property to the injury of the minority stockholders. Such a course of action is clearly opposed to the true interests of the corporation itself, plainly discloses that one thus acting was not influenced by any honest desire to secure such interests, but that its action was to serve an outside purpose, regardless of consequences to the debtor company, and in a manner inconsistent with its interest and the interest of its minority stockholders."

The fact that the right to purchase and hold stock is expressly conferred upon a corporation by statute, in no way confers upon it power to employ the stock for inequitable purposes. Without statutory authority, it has no power to hold stocks at all. With authority, it assumes the equitable obligations of any majority stockholder.

§ 301. **Remedies of Minority Stockholders of Controlled Corporation.** — While a corporation, holding a controlling interest in another company, so long as it fulfils the obligation of its trust relation towards minority stockholders, may exercise its legal power to determine the policy of the corporation which it controls, it will be restrained by a court of equity, at the instance of a minority stockholder, when it disregards its obligations and manages, or undertakes to manage, the corporation for its own use rather than for the benefit of all the stockholders.¹ The temptation to regulate

¹ One railroad company, owning a majority of the stock of another railroad company, and controlling its affairs, has no right to vote its stock so as to manage the corporation for its own use rather than for the latter's benefit, to impair its earnings and prejudice the rights of its minority stockholders; and equity will restrain such voting. *Memphis, etc. R. Co. v. Wood*, 88 Ala. 630 (1889), (7 So. Rep. 108).

Where a railroad company has purchased a majority of the stock of a competing company in order to lessen competition, and, after assuming control, violates its duties in respect to the

property and rights of the controlled company, and commits wilful waste, a court of equity will interfere, at the suit of a minority stockholder of the controlled corporation, and will restrain the controlling corporation from further using its stock in the management of the corporation, and in the election of its officers. *George v. Central R., etc. Co.*, 101 Ala. 607 (1892), (14 So. Rep. 752).

Generally, that one corporation may be enjoined from voting the majority stock held by it in another corporation when the two companies have conflicting interests, see *American, etc. Co. v.*

the affairs of a competing company in its own interest is, naturally, so great that a court of equity will zealously guard the rights of minority stockholders from actual or threatened infringement, and will restrain, by injunction, the controlling corporation from administering the affairs of the corporation in a manner injurious to the corporation and its stockholders as a whole. Equity will compel majority stockholders to exercise their controlling power over a corporation in *its* interest and not for ulterior purposes.

Linn, 93 Ala. 610 (1890), (7 So. Rep. 191); Mack v. DeBardleben, etc. Co., 90 Ala. 396 (1890), (8 So. Rep. 150).

Fraudulent use of its power by a corporation holding a majority of the stock of another corporation, to the injury of minority stockholders, may constitute ground for the appointment of a receiver for the corporation. Davis v. United States Electric Power, etc. Co., 77 Md. 35 (1893), (25 Atl. Rep. 982).

In Milbank v. New York, etc. R. Co., 64 How. Pr. (N. Y.) 28 (1882), the Court said: "It is against public policy to have, or permit, one corporation to embarrass and control another, and, perhaps, competing corporation, in the management of its affairs, as may be done if it is permitted to own and vote upon the stock." Compare this language with the decision in another New York case (Oelbermann v. New York, etc. R. Co., 77 Hun (N. Y.), 332 (1894), (29 N. Y. Supp. 545)), where it was held that a court of equity could not

restrain a controlling corporation from voting on its stock upon allegation or proof that it intended to cause a board of directors to be elected, who, by their action or non-action, might prejudice the interests of minority stockholders.

Where one railroad company controls another, as a part of its system, through the ownership of stock, and operates the road of the latter company in its own interest, and not in the interest of the controlled company, a receiver, into whose hands both roads have passed, cannot recover from the controlled company expenses incurred in operating it. Phinizy v. Augusta, etc. R. Co., 62 Fed. 771 (1894).

That laches may bar a minority stockholder of a corporation, controlled by another, from complaining of the diversion of traffic and misuse of property by the controlling corporation, see Alexander v. Searcy, 81 Ga. 536 (1889), (8 S. E. Rep. 630).

PART V.

COMBINATIONS OF CORPORATIONS.

ARTICLE I.

COMBINATIONS AS AFFECTED BY PRINCIPLES OF
CORPORATION LAW.

CHAPTER XXVIII.

NATURE AND FORMATION OF COMBINATIONS.

- § 302. Definition of Term "Combination."
- § 303. Definition of Term "Association."
- § 304. Definition of Term "Trust."
- § 305. Popular Use of Word "Trust."
- § 306. Definition of Phrase "Corporate Combination."
- § 307. Evolution of the Combination.
- § 308. Formation of Associations.
- § 309. Formation of Trusts.
- § 310. Formation of Corporate Combinations.
- § 311. Analysis of Principles determining Legality of Combinations.

§ 302. Definition of Term "Combination." — The word "combination" is used in this treatise as a generic term to describe any union of corporations,¹ not amounting to consolidation, entered into by mutual agreement for supposed mutual advantage.²

¹ Industrial combinations are, practically, combinations of corporations. The modern combination of capital is a corporate combination. Combinations of individuals are, however, governed by the same rules of public policy, and anti-trust legislation — State and federal — is directed both against combinations of corporation and individuals.

The scope of this treatise includes only an examination of the principles relating to combinations of corporations, but, in such examination, it is believed to be both necessary and desirable to refer freely to all illustrative cases — whether of combinations of individuals or of corporations.

² "The union or association of two

§ 303. **Definition of Term "Association."** — The term "association" is employed to describe that species of combination wherein two or more competing corporations unite, by agreement, for a special purpose of business, and conduct their affairs according to such agreement, but in which there is no community of financial interest and each corporation retains its own property and manages its own affairs.¹

or more persons for the attainment of some common end." Century Dictionary *sub nom.* "Combination." In *Watson v. Harlem, etc. Nav. Co.*, 52 How. Pr. N. Y.) 352 (1877), the Court thus discussed the meaning to be attached to the word "combine" as used in a statute forbidding certain companies to "combine": "The word 'combine' is not to be found in either of the dictionaries of Burrill or Bouvier, and I do not find it defined in the edition of Jacobs to which I have access. Bouvier defines 'combination' as a union of men for the purpose of violating the law, and as a union of different elements. Jacobs, without specifically defining the word, states that 'combinations to do unlawful acts are punishable before the unlawful act is executed; this is to prevent the consequences of combinations and conspiracies,' and he refers to the titles 'Confederacy' and 'Conspiracy.' He defines confederacy to be 'where two or more combine together to do any damage or injury to another, or to do any unlawful act.' As to the meaning of the word 'conspiracy,' he says this word was formerly used almost exclusively 'for an agreement of two or more persons falsely to indict one, or to procure him to be indicted of felony; now it is no less commonly used for the unlawful combination of workmen to raise their wages, or to refuse working except on stipulated conditions.' Worcester defines 'combine' thus: 'To join together;' 'to coalesce;' 'to unite;' 'to be united;' 'to be joined in friendship or in design.' And he defines 'combination' to be a 'union of persons for certain purposes,' 'associa-

tion,' 'alliance,' 'coalition,' 'confederacy.' And Roget, in his *Thesaurus*, classifies the word 'combine' as synonymous with or belonging to the same class as 'unite, incorporate, amalgamate, embody, absorb, re embody, blend, merge, fuse, melt into one, consolidate, coalesce, centralize, to impregnate, to put together, to lump together' . . . I think that there can be no difficulty in determining precisely what the legislature intended in using the word 'combine' in the twenty-seventh section of the act now under consideration. They did not intend to use, and did not use, that word in the strict technical legal sense which is maintained by the counsel for the defendants. The object of the legislature was to prevent coalitions, unions, mutual agreements, blendings of the companies which might be organized and incorporated, under the act, for any purpose."

See also *ante*, § 16: "*Distinction between Consolidation and Combination.*"

¹ "The act of a number of persons who unite or join together for some special purpose or business. The union of a company of persons for the transaction of designated affairs, or the attainment of some common object." Black's Law Dict., *sub nom.* "Association."

"As mercantile concerns under freedom of trade have tended in our cities to be more and more vast and comprehensive and absorb the smaller ones, so it is reasonable to suppose that the right of *association* will be made more and more available in manufacturing. In fact the two tendencies are, in substance, the same. If association is

§ 304. **Definition of Term "Trust."** — A specific definition of the term "trust," as applied to industrial combinations, is: A combination of competing corporations formed through the transfer by the stockholders of several corporations to a common trustee of controlling stock interests therein, in exchange for certificates, issued by the trustee, for each stockholder's proportional equitable interest in all the stock so transferred.¹

§ 305. **Popular Use of Word "Trust."** — The word "trust," as popularly used, has a much broader meaning than is indicated by its specific definition. It is applied generally to all combinations of industrial corporations formed for the purpose of regulating the price and supply of commodities.² The form of combination is immaterial. Associations for pooling products and corporations formed for the purpose

prevented by law different manufactories may be melted into one." Article in "Political Science Quarterly," vol. 3, p. 609, by Prof. Theodore W. Dwight.

¹ "An organization for the control of several corporations under one direction by the device of a transfer by the stockholders in each corporation of at least a majority of the stock to a central committee, or board of trustees, who issue in return to such stockholders, respectively, certificates showing in effect that, although they have parted with their stock and the consequent voting power, they are still entitled to dividends or to share in the profits — the object being to enable the trustees to elect directors in all the corporations, to control and suspend at pleasure the work of any, and thus economize expenses, regulate production and defeat competition." Century Dict. *sub nom.* "Trust" (specific definition).

A trust "is an arrangement by which the stockholders of various corporations place their stocks in the hands of certain trustees, and take in lieu thereof certificates showing each stockholder's equitable interest in all the stock so held. The result is twofold: 1. The stockholders thereby become

interested in all the corporations whose stocks are thus held. 2. The trustees elect the directors of the several corporations." Pamphlet by Mr. S. C. T. Dodd, general solicitor Standard Oil Co., entitled "Combinations: Their Uses and Abuses."

² Black's Law Dict. *sub nom.* "Trusts." In *Queen Ins. Co. v. State* (Tex. Civ. App. 1893), 22 S. W. Rep. 1048, 22 L. R. A. 492, the Court said: "The term 'trust' is not employed in a technical legal sense. By very recent commercial usage, the meaning of the word has been extended so as to comprehend combinations of corporations or capitalists for the purpose of controlling the price of articles of prime necessity, or the charges of transportation, to the public. The formation of gigantic combinations for these purposes in late years has created alarm and excited the liveliest interest in the public mind. The amount of discussion which it has invoked, considering the time during which it has progressed, is probably without parallel." See also *State v. Firemen's Fund Ins. Co.*, 152 Mo. 1 (1899), (52 S. W. Rep. 595). For definitions of the term "trust" in State anti-trust statutes, see *post*, § 405.

of purchasing corporate properties have both — and with equal inaccuracy — been called “trusts.”

The words “trust” and “combination” are often used synonymously, and a definition of a combination as “a union of men for the purpose of violating the law,”¹ defines a trust as it has sometimes existed, possibly more in the past than in the present, in the popular imagination.

This broad use of the word “trust” to describe combinations which are not in the trust form, producing confusion and, sometimes, unwarranted prejudice, should be avoided. The word is used in this treatise as applying specifically to the trust form of combination.

§ 306. **Definition of Phrase “Corporate Combination.”** — The phrase “corporate combination” may be defined as a combination of corporations formed by the transfer of the controlling stock interests, or the properties and good-will, of several corporations, engaged in the same branch or connected branches of business, to a single corporation, formed for the purpose, which, by virtue of the transfer, acquires a proprietary interest in such stock or properties.²

§ 307. **Evolution of the Combination.** — There have been three distinct steps in the development of the present corporate combination, brought about in an attempt to make effective the tendency of modern business life towards the concentration of corporate interests in the face of adverse judicial decisions:

First. Associations of corporations for supposed mutual advantage were formed, having for their object, generally, the restriction of production and the regulation of prices. This form of corporate co-operation was usually exemplified

¹ Bouvier's Law Dict. (Rawle's Ed.) *sub nom.* “Combinations”

² Strictly speaking, any combination of corporations is a corporate combination. As used in this treatise, however, the phrase has reference rather to the form of the combination than to its elements. The phrase “corporate form of combination” would be more exact but less convenient.

Mr. Eddy in his treatise upon “Combinations,” from which the phrase is taken, defines corporate combinations as follows (§ 583): “Combinations formed by the sale or lease of the properties, assets and good-will of the several parties or corporations to one large corporation organized for the purpose of acquiring the several properties.”

by pooling agreements and selling agencies, which left the several corporations independent of each other, except as bound by a more or less informal agreement. Combinations of this character were declared illegal by the courts, as tending to suppress competition and, consequently, as contrary to public policy.

Second. The trust form of combination was resorted to in an attempt to avoid the effect of the decisions against associations, apparently in the belief that the deposit by stockholders of their shares with a common trustee for a common purpose, did not constitute a combination of corporations, because

(1) The acts of the stockholders were not the acts of the corporations.

(2) The stockholders of the several corporations had a right, if they saw fit, to deposit their stock with a trustee.

These views, however, were not adopted, in their entirety, by the courts, and the trust form of combination was condemned, not only for the reasons stated in the case of associations, but because it violated fundamental principles of the law of corporations.

Third. The corporate combination was then formed to avoid the effect of the decisions against the "trust." In the form of a corporation *holding* the stocks of the subsidiary companies it has not always withstood attack, even for reasons peculiar to corporation law. In the form of a corporation *purchasing* the plants of the several companies, it seems invulnerable from that standpoint, but, in common with every form of combination, may be successfully attacked if formed for an unlawful purpose.

§ 308. Formation of Associations.

(A) *Railroad Pools* :

An agreement between competing railroad or other transportation companies whereby, for the purpose of avoiding competition, the joint traffic or earnings are divided between the companies in fixed proportions, constitutes "pooling."

Railroad pools are of two kinds :

(1) *Traffic pools*, wherein an agreed proportion of the

traffic or business of all the companies is allotted to each corporation.¹

(2) *Pools of earnings*, wherein all the earnings or profits are placed in a common fund or pool and divided between the corporations in the proportions stated in the agreement.²

Manufacturing corporations may also, if not unlawful, "pool" their products or earnings, but the term is generally used with reference to the agreements of railroad or other transportation companies.³

(B) *Industrial Associations* :

Associations of competing industrial corporations have for their primary object the restriction of competition. This object has been sought to be attained under agreements in various forms :

(1) Agreements prescribing a scale of prices at which the products of the several companies shall be sold.⁴

(2) Agreements limiting the amount of production of each company.⁵

(3) Agreements appointing a common selling agent to dispose of the products of all the companies at fixed prices, or at prices adjusted by a supervising committee.⁶

(4) Agreements for the purchase of a company's entire production for a term of years.⁷

¹ *Eclipse Towboat Co. v. Pontchartrain R. Co.*, 24 La. Ann. 1 (1872).

² *Hare v. London, etc. R. Co.*, 2 Johns. & H. 80 (1861), (30 L. J. Ch. 817, 7 Jur. (N. S.), 1145).

³ For consideration of the legality of "pooling," see *post*, § 364: "*Associations of Railroad Companies. Traffic Contracts of Competing Lines. Pools.*"

⁴ *Dolph v. Troy Laundry Mach. Co.*, 28 Fed. (553) (1886); *De Witt Wire Cloth Co. v. New Jersey Wire Cloth Co.*, 16 Daly (N. Y.) 529 (1891), (14 N. Y. Supp. 277); *Cohen v. Berlin & Jones Env. Co.*, 38 App. Div. (N. Y.) 499 (1899), (56 N. Y. Supp. 588); *Nester v. Continental Brewing Co.*, 161 Pa. St. 473 (1894), (29 Atl. Rep. 102); *Herriman v. Menzies*, 115 Cal. 16 (1896),

(44 Pac. Rep. 660); *Texas Standard Oil Co. v. Adoue*, 83 Tex. 650 (1892), (19 S. W. Rep. 274).

⁵ *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173 (1871); *Santa Clara Valley Mill, etc. Co. v. Hayes*, 76 Cal. 387 (1888), (18 Pac. Rep. 391).

⁶ *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173 (1871); *Skrainka v. Scharringhausen*, 8 Mo. App. 522 (1880); *Central Shade Roller Co. v. Cushman*, 143 Mass. 353 (1887), (9 N. E. Rep. 629); *Cummings v. Union Blue Stone Ass'n*, 15 App. Div. (N. Y.) 602 (1897), (44 N. Y. Supp. 787).

⁷ *Live Stock Ass'n v. Levy*, 54 N. Y. Super. Ct. 32 (1886); *Pacific Factor Co. v. Adler*, 90 Cal. 110 (1891), (27 Pac. Rep. 36).

(5) Agreements to give rebates to members of association.¹

Many other forms of agreement, modifications of those stated, have also been adopted.

§ 309. **Formation of Trusts.** — The following elements are essential to the formation and existence of the trust form of combination:

(1) The deposit by the holders of a majority of the shares of the several corporations to be combined of their shares with a trustee or trustee body, and the transfer of the legal title thereof to the trustee.

(2) The issue and delivery by the trustee to the stockholders, in lieu of the stock deposited, of trust certificates showing the proportional interest of each stockholder in *all* the stock deposited.

(3) The execution of a trust agreement² defining the rights of the parties; providing, generally, for the election and succession of trustees, their term of office and the transfer of trust certificates, and necessarily providing

(A) That the trustee shall vote the stock deposited and elect the directors of the several corporations.

(B) That the trustee shall receive all dividends from the several corporations and place them in a common fund.

(C) That the trustee shall make dividends from this fund — when sufficient for the purpose — upon the trust certificates.

§ 310. **Formation of Corporate Combinations.** — As indicated by the definition, corporate combinations generally take one of two distinct forms, and are usually created in the manner following:

(1) In pursuance of an agreement between persons interested in competing corporations, a *holding* corporation is organized, under the laws of a State permitting its corporations to acquire and hold the stock of other corporations,

¹ *Mogul Steamship Co. v. McGregor*, L. R. 17 App. Cas. 25 (1891), 61 L. J. R. 295. 121 N. Y. 582 (1890), (24 N. E. Rep. 834, 18 Am. St. Rep. 483), and that in the case of the Standard Oil Trust, in *State v. Standard Oil Co.*, 49 Ohio St. 137 (1892), (30 N. E. Rep. 279, 34 Am. St. Rep. 541, 36 Am. & Eng. Corp. Cas. 1).

² The trust agreement in the case of the Sugar Trust is stated at length in *People v. North River Sugar Ref'g Co.*, 489

with a capital stock at least equal to the aggregate capital of the several corporations. This corporation issues its own shares, upon an agreed basis, in exchange for the shares of the several corporations, provided that it obtain at least a majority of the shares of each corporation. All the corporations continue in existence, and the subsidiary companies are controlled by the holding corporation, which derives its income from the dividends paid by them. In organizing this form of corporate combination the dealings are entirely between the holding corporation and the *stockholders* of the several companies.

(2) As a part of a plan for combining competing corporate interests, a *purchasing* corporation is organized, with a share capital sufficiently large for the purpose, which purchases the properties — plants, stock in trade and good-will — of the several corporations and issues its own stock in payment therefor. Preferred stock is generally issued for tangible assets; common stock for good-will. The shares are usually delivered to the vendor corporations, but may be directly distributed among their stockholders.

The purchasing corporation, as the result of this process, becomes the absolute owner of the property of all the corporations, and may continue or suspend the business theretofore carried on by them, and otherwise manage its affairs, without restriction or supervision except by the State and its own stockholders. This form of corporate combination is, in its creation, wholly between the two corporations, vendor and purchaser, and is least liable of all to violate any principle of corporation law.

In particular instances, this form has been modified and corporate properties have been taken over under lease instead of sale. So, corporate combinations have been brought about by uniting the two methods — by acquiring both the stock and the property of the several corporations, or the stock of some and the property of others.

§ 311. **Analysis of Principles determining Legality of Combinations.**—The legality of a combination of corporations in any form — trust, corporate combination or simple association —

must be ascertained by the application of the following negative principles :

(1) *A combination of corporations is illegal which contravenes the principles of law governing corporations.*

In applying this principle it is of importance to ascertain :

(A) The manner of organization.

(B) The powers of the companies.

(2) *A combination is illegal which contravenes rules of public policy.*¹

In applying this principle it is of essential importance to ascertain :

(A) The purposes of the combination — as a fact.

(B) The rules of public policy — as a matter of law.

(C) The bearing of the rules upon the facts.

(3) *A combination is illegal which contravenes any statutory provision.*

The application of this axiomatic principle, in any particular case, may depend upon :

(A) The form and object of the combination.

(B) The constitutionality and construction of the statute.

CHAPTER XXIX.

PRINCIPLES OF CORPORATION LAW AFFECTING ASSOCIATIONS AND TRUSTS.

§ 312. Legality of Associations not generally a Question of Corporation Law.

§ 313. In Formation of Trust, State regards Acts of Stockholders as Acts of Corporation.

§ 314. Trust invalid as involving Partnership of Corporations.

§ 315. Trust invalid as involving Delegation of Corporate Powers.

§ 316. Trust invalid as involving Practical Consolidation.

§ 317. Rights and Liabilities growing out of Trusts.

§ 312. **Legality of Associations not generally a Question of Corporation Law.** — The association of several corporations

¹ A combination amounting to a combinations of capital are seldom conspiracy is also illegal, but modern conspiracies. See post, § 328.

for the promotion of their common interests is merely the exercise of the general right to contract, pertaining to every corporation within the limitations of its charter.

Corporations, retaining the management of their affairs, may generally — so far as principles of corporation law are concerned — enter into such agreements with other corporations as they may deem expedient. Such agreements are seldom *ultra vires*, except in the broad sense that an unlawful act is always *ultra vires*. The test of illegality, however, lies in the application of other principles than those of corporation law.

§ 313. **In Formation of Trust, State regards Acts of Stockholders as Acts of Corporation.** — One reason for adopting the trust form of combination was the assumption that because the corporations were not parties to the agreement between the stockholders and the trustee, they did not, themselves, participate in the combination.

This assumption was based upon the legal fiction that a corporation is a legal entity separate and distinct from the natural persons who compose it. This fiction is necessary for the protection and enforcement of rights between the corporation, its stockholders and persons with whom it has dealings, but it has no place in the relations of a corporation with the State which created it. The State grants the charter of incorporation to the incorporators and may take that charter away from them. It deals with a corporation as a collection of its members, and treats their united acts as the acts of the corporation, because, from its point of view, they *are* the corporation. A trust, formed by the stockholders of corporations, in the eyes of the State is the creation of the corporations.

In the *Sugar Trust Case*,¹ the Court of Appeals of New York said: "The abstract idea of a corporation, the legal entity, the impalpable and intangible creation of human thought, is itself a fiction, and has been appropriately described as a figure of speech. It serves very well to desig-

¹ *People v. North River Sugar Ref'g Co.*, 121 N. Y. 621 (1890), (24 N. E. Rep. 834, 18 Am. St. Rep. 483).

nate in our minds the collective action and agency of many individuals as permitted by the law; and the substantial inquiry always is what, in a given case, has been that collective action and agency. As between the corporation and those with whom it deals, the manner of its exercise usually is material, but as between it and the State, the substantial inquiry is only what that collective action and agency has done, what it has, in fact, accomplished, what is seen to be its effective work, what has been its conduct. It ought not to be otherwise. The State gave the franchise, the charter, not to the impalpable, intangible and almost nebulous fiction of our thought, but to the corporators, the individuals, the acting and living men, to be used by them, to redound to their benefit, to strengthen their hands and add energy to their capital. If it is taken away, it is taken from them as individuals and corporators, and the legal fiction disappears. The benefit is theirs, the punishment is theirs, and both must attend and depend upon their conduct; and when they all act, collectively, as an aggregate body, without the least exception, and so acting, reach results and accomplish purposes clearly corporate in their character, and affecting the vitality, the independence, the utility, of the corporation itself, we cannot hesitate to conclude that there has been corporate conduct which the State may review, and not be defeated by the assumed innocence of a convenient fiction. As was said in *People v. Turnpike Road Co.*:¹ 'Though the proceeding by information be against the corporate body, it is the acts or omissions of the individual corporators, that are the subject of the judgment of the court.'"²

¹ *People v. Turnpike Road Co.*, 23 Wend. (N. Y.) 205 (1840).

² In the case of *State v. Standard Oil Co.*, 49 Ohio St. 137 (1892), (30 N. E. Rep. 279, 34 Am. St. Rep. 541, 36 Am. & Eng. Corp. Cas. 1), similar conclusions were reached by the Supreme Court of Ohio. Judge Minshall said (p. 177): "The general proposition that a corporation is to be regarded as a legal entity, existing separate and apart

from the natural persons composing it, is not disputed; but that the statement is a mere fiction, existing only in idea, is well understood, and not controverted by any one who pretends to accurate knowledge on the subject. It has been introduced for the convenience of the company in making contracts, in acquiring property for corporate purposes, in suing and being sued, and to preserve the limited liabil-

§ 314. **Trust invalid as involving Partnership of Corporations.**

— The primary object in forming a trust is to concentrate the control of several competing corporations into a single board. The several corporations, through the instrumentality of the trustees, are managed for a common purpose, and their stockholders divide the profits of a joint enterprise. The whole arrangement constitutes a partnership of corporations.¹ As said by the Supreme Court of Tennessee in the *Cotton Seed Oil Trust Case*:² “A careful examination of this agreement discloses every material element of the contract of

ity of the stockholders, by distinguishing between the corporate debts and property of the company, and of the stockholders in their capacity as individuals. All fictions of law have been introduced for the purpose of convenience and to subserve the ends of justice. It is in this sense that the maxim, *In fictione juris subsistit aequitas*, is used, and the doctrine of fictions applied. But when they are urged to an intent and purpose not within the reason and policy of the fiction they have always been disregarded by the courts. . . . (p. 179). Now so long as a proper use is made of the fiction that a corporation is an entity apart from its shareholders, it is harmless, and because convenient, should not be called in question; but when it is urged to an end subversive of its policy, or such is the issue, the fiction must be ignored, and the question determined, whether the act in question, though done by shareholders, that is to say, by the persons united in one body, was done simply as individuals and with respect to their individual interests as shareholders, or was done ostensibly as such, but, as a matter of fact, to control the corporation and affect the transaction of its business, in the same manner as if the act had been clothed with all the formalities of a corporate act. This must be so, because the stockholders, having a dual capacity, and capable of acting in either, and a possible interest to conceal their character when acting in their

corporate capacity, the absence of the formal evidence of the character of the act cannot preclude judicial inquiry on the subject. If it were otherwise, then, in one department of the law, fraud would enjoy an immunity awarded to it in no other.”

¹ Trusts have been held to amount to partnerships of corporations in the following leading cases: *Mallory v. Hanaur Oil Works*, 86 Tenn. 598 (1888), (8 S. W. Rep. 396, 20 Am. & Eng. Corp. Cas. 478); *People v. North River Sugar Ref'g Co.*, 121 N. Y. 582 (1890), (24 N. E. Rep. 834, 18 Am. St. Rep. 483); *State v. Standard Oil Co.*, 49 Ohio St. 137 (1892), (30 N. E. Rep., 279, 34 Am. St. Rep. 541, 36 Am. & Eng. Corp. Cas. 1); *American Preservers Trust v. Taylor Mfg. Co.*, 46 Fed. 152 (1891); *Bishop v. American Preservers Co.*, 157 Ill. 284 (1895), (41 N. E. Rep. 765). In the last case the Court said: “It will thus be seen that the agreement in question makes provision for welding together all the interests engaged in the business named in the agreement into one giant combination or partnership, under the absolute dominion and control of a board of nine trustees. . . . The agreement was illegal as providing for a partnership among corporations. It is a violation of the law for corporations to enter into partnership.”

² *Mallory v. Hanaur Oil Works*, 86 Tenn. 602 (1888), (8 S. W. Rep. 396, 20 Am. & Eng. Corp. Cas. 478).

partnership. The absolute ownership of the corporate property, the mills, machinery, etc., is not conveyed to the partnership, nor is this necessary. The beneficial *use* of all such property is surrendered to the common purpose. The provisions for the complete possession, control and use of the properties of the several corporations by the partnership or syndicate is perfect. Nothing is left to the several corporations but the right to receive a share of the profits and participate in the management and control of the consolidated interests as members of the new association. The contract is, both technically and in its essential character, a partnership in so far as it is possible for corporations to form such an association."

A trust, therefore, constituting a partnership of corporations, must depend for its validity upon the power of the corporations to form a partnership. No such implied power exists. A partnership is inconsistent with the scope, object, powers and obligations of a corporation. It interferes with the management of the affairs of a corporation by its own officers, impairs the authority of the stockholders, involves the corporation in outside enterprises, and is opposed to public policy.¹

In the absence of express legislative authority to enter a partnership, it is *ultra vires* of a corporation to enter a trust.

¹ *United States: American Preservers Trust v. Taylor Mfg. Co.*, 46 Fed. 152 (1891).

Alabama: Central R., etc. Co. v. Smith, 76 Ala. 572 (1884), (52 Am. Rep. 352).

Georgia: Gunn v. Central R., etc. Co., 74 Ga. 509 (1885).

Illinois: Bishop v. American Preservers Trust, 157 Ill. 284 (1895), (41 N. E. Rep. 765); *Marine Bank v. Ogden*, 29 Ill. 248 (1862).

Massachusetts: Whittendon Mills v. Upton, 10 Gray, 582 (1858).

New York: People v. North River Sugar Ref'g Co., 121 N. Y. 623 (1890), (24 N. E. Rep. 834, 18 Am. St. Rep.

483): "It is a violation of the law for corporations to enter into a partnership. . . . The vital characteristics of the corporation are of necessity drowned in the paramount authority of the partnership." See also *New York, etc. Canal Co. v. Fulton Bank*, 7 Wend. 412 (1831).

Ohio: State v. Standard Oil Co., 49 Ohio St. 137 (1892), (30 N. E. Rep. 279, 34 Am. St. Rep. 541, 36 Am. & Eng. Corp. Cas. 1).

Tennessee: Mallory v. Hanaur Oil Works, 86 Tenn. 598 (1888), (8 S. W. Rep. 396, 20 Am. & Eng. Corp. Cas. 478).

§ 315. **Trust invalid as involving Delegation of Corporate Powers.** — Statutes relating to the organization and management of corporations contain provisions for their control, primarily, by their stockholders, and, immediately, by their directors, and indicate the policy of the State that the affairs of corporations should be conducted, really as well as formally, by their own officials. The formation of a trust substitutes the trustees as the governing body and makes the directors merely tools.¹ It involves the delegation of corporate powers, is against public policy, and is inconsistent with the purposes for which corporations are created.

In the *Case of the Standard Oil Trust*,² the Supreme Court of Ohio said: "The law requires that a corporation should be controlled and managed by its directors in the interests of its own stockholders, and conformable to the purpose for which it was created by the laws of its State."

This principle underlies the objection that trusts amount to corporate partnerships, but is applicable, with equal force, if any element necessary to constitute a partnership be lacking.³

¹ In *Gould v. Head* ("American Cattle Trust" Case), 38 Fed. 888 (1889), (reversed on appeal, 41 Fed. 240) (1890), Judge Hallett said: "The corporations thus associated renounced autonomy, but not their existence. They committed their affairs into the hands of the trust, because they could be better managed by the trust than by themselves. They still lived and owned their property, but the trust was a regency of their own creation, with absolute and irrevocable power over all their concerns. Ten corporations are mentioned in the affidavits as thus united in the trust, not by the direct act of the corporations, but by transfer of their stock to the trust, or to persons holding in its interest. And it is urged that by some general expression in the articles of association the trust was given absolute authority to sell and dispose of the stock in its discretion. But this interpretation is not in accord

with the purpose for which the trust was organized. The stock was transferred to the trust, not for the purpose of being sold, but to give control of the corporation; to make the officers puppets in the hands of the trust, and thus substitute the latter as the governing body of the corporation."

See also *People v. North River Sugar Ref'g Co.*, 121 N. Y. 582 (1890), (24 N. E. Rep. 834, 18 Am. St. Rep. 483).

² *State v. Standard Oil Co.*, 49 Ohio St. 185 (1892), (30 N. E. Rep. 279, 34 Am. St. Rep. 541, 36 Am. & Eng. Corp. Cas. 1).

³ *State v. Standard Oil Co.*, 49 Ohio St., 185 (1892), (30 N. E. Rep. 279, 34 Am. St. Rep. 541, 36 Am. & Eng. Corp. Cas. 1): "That the nature of the agreement is such as to preclude the defendant from becoming a party to it, is, we think, too clear to require much consideration by us. In the first place

§ 316. **Trust invalid as involving Practical Consolidation.** — A combination of corporations by means of a trust amounts to a practical consolidation. The actual results of a union of corporate interests are obtained without subjection to the restraints imposed by the State when authorizing corporations to consolidate. Under consolidation statutes, the result may be a new corporation, owing obligations to the State and with limitations imposed upon the amount of its stock. The result of the formation of a trust is an irresponsible board of trustees, and a virtual doubling of paper capital by the issue of trust certificates for shares.

Consolidation, without statutory authority, is opposed to public policy. Substantial consolidation is equally against public policy, for it involves a failure in the performance of corporate duties. Judge Finch, in the *Sugar Trust Case*,¹ stated, in very vigorous language, his opinion of the tendencies of trusts and similar combinations and their effect upon the public interests: "As corporate grants are always assumed to have been made for the public benefit, any conduct which destroys their normal functions, and maims and cripples their separate activity, and takes away their free and independent action, must so far disappoint the purpose of their creation as to affect unfavorably the public interest; and that to a much greater extent when, beyond their own several aggregations of capital, they compact them all into one combination, which stands outside of the ward of the State, which dominates the range of an entire industry, and puts upon the market a capital stock proudly defiant of actual values, and capable of an unlimited expansion. It is not a sufficient answer to say that similar results may be lawfully accomplished; that an individual having the necessary wealth might have bought all these refineries, manned them with his own chosen agents, and managed them as a group at his

whether the agreement should be regarded as amounting to a partnership between the several companies, limited partnerships and individuals, who are parties to it, it is clear that its observance must subject the defendant to a

control inconsistent with its character as a corporation."

¹ *People v. North River Sugar Ref'g Co.*, 121 N. Y. 625 (1890), (24 N. E. Rep. 834, 18 Am. St. Rep. 483).

sovereign will; for it is one thing for the State to respect the rights of ownership and protect them out of regard to the business freedom of the citizen, and quite another thing to add to that possibility a further extension of those consequences by creating artificial persons to aid in producing such aggregations. The individuals are few who hold in possession such enormous wealth, and fewer still who peril it all in a manufacturing enterprise; but if corporations can combine, and mass their forces in a solid trust or partnership, with little added risk to the capital already embarked, without limit to the magnitude of the aggregation, a tempting and easy road is opened to enormous combinations, vastly exceeding in number and in strength, and in their power over industry, any possibilities of individual ownership;¹ and the State, by the creation of the artificial persons constituting the elements of the combination, and failing to limit and restrain their powers, becomes itself the responsible creator, the voluntary cause of an aggregation of capital which it simply endures in the individual as the product of his free agency. What it may bear is one thing, what it should cause and create is quite another."

§ 317. **Rights and Liabilities growing out of Trusts.** — While the rights and liabilities of trustees and certificate holders, and the nature of trust certificates and privileges attaching thereto, have received judicial consideration,² — especially

¹ This language seems prophetic, viewed in the light of the present day of billion-dollar combinations. The reasoning, however, is inconclusive. The State may properly limit the capital of corporations and may restrain their combination. But, in the absence of such limitation or restraint, the tendency of combinations to produce "enormous" "aggregations" of capital in no way indicates their illegality. The words are merely relative, and no principle of the common law limits the amount of property to be held by a person or private corporation.

² I. *Rights of trustees.*

The trustees hold the stock in the several corporations as trustees and

not as vendees. *People v. North River Sugar Ref'g Co.*, 121 N. Y. 582 (1890), (24 N. E. Rep. 834, 18 Am. St. Rep. 483). Their right to sell the shares so held depends upon the terms of the trust agreement. Trustees authorized by the agreement "to acquire, receive, hold and dispose of" such shares have power to sell them to third persons. *Gould v. Head*, 41 Fed. 240 (1890), reversing 38 Fed. 886 (1889). Compare *People v. North River Sugar Ref'g Co.*, 54 Hun (N. Y.), 354 (1889), (3 N. Y. Supp. 401).

II. *Transferability of certificates.*

Trust certificates are transferable like shares of stock. *Cameron v. Havemeyer*, 25 Abb. N. C. 436 (1890), (12

in the embryonic stage of the trust,—it must be borne in mind, in examining the decisions, that trusts have now been generally declared invalid, and that the courts may decline to lend their aid to any of the parties to an illegal enterprise.¹

The holders of trust certificates are the equitable owners of shares deposited.² The certificates represent property, and it has been held that, although the trust is illegal, the rights of certificate holders will be respected by the courts;³ that they are entitled to have the property and business of the trust placed in the hands of a receiver for the purpose of winding up its affairs.⁴

N. Y. Supp. 126). See also *Gould v. Head*, 41 Fed. 240 (1890). Where trust certificates are made transferable upon the books of the trust, a trustee can be compelled to make the transfer and to issue a new certificate to the transferee. *Rice v. Rockefeller*, 134 N. Y. 174 (1892), (31 N. E. Rep. 907). See also as to the nature of trust certificates, *State v. American Cotton Oil Trust*, 40 La. Ann. 8 (1888), (3 So. Rep. 409).

¹ *Bishop v. American Preservers Co.*, 157 Ill. 284 (1895), (41 N. E. Rep. 765); *American Biscuit, etc. Co. v. Klotz*, 44 Fed. 721 (1891).

² *People v. North River Sugar Ref'g Co.*, 121 N. Y. 582 (1890), (24 N. E. Rep. 834, 18 Am. St. Rep. 483).

³ *State v. American Cotton Oil Trust*, 40 La. Ann. 8 (1888), (3 So. Rep. 409): "If, as alleged, these certificates have been taken as the price or in exchange for ten million dollars of property transferred to the trust, then, whatever be their validity and effect as shares of stock, whether or not they confer on the holders the privileges of corporate stockholders, or whether or not they confer the right to participate in the carrying on of any illegal business, yet they undoubtedly do represent an interest in the property referred to, and, as such, have a legal and real value."

⁴ *Cameron v. Havemeyer*, 25 Abb. N. C. (N. Y.) 438 (1890), (12 N. Y. Supp. 126).

CHAPTER XXX.

PRINCIPLES OF CORPORATION LAW AFFECTING CORPORATE
COMBINATIONS.

- § 318. Corporate Combinations by Means of Purchasing Corporations — In General.
- § 319. Issue of Stock for Property in Formation of Corporate Combination.
- § 320. Issue of Stock for Good-will in Formation of Corporate Combination.
- § 321. Over-valuation of Property acquired by Issue of Stock.
- § 322. Power of Vendor Corporations to sell Properties for Stock of Purchasing Corporation.
- § 323. Corporate Combinations through Formation of Holding Corporations.

§ 318. Corporate Combinations by Means of Purchasing Corporations — In General. — Any purchase by one corporation of the plants and properties of other companies involves, in a sense, a combination of interests. The separate properties are united, and the business theretofore carried on by the different corporations is conducted by one.

The result may be the same whether the several plants are purchased from time to time as incidental to the development and extension of the business of the purchasing corporation, or whether they are taken over at one time by a corporation formed for that express purpose. The phrase "corporate combination" is, however, only applicable in the latter case. The methods adopted in forming corporate combinations of this character vary in detail, but usually follow the forms outlined in a preceding section.¹

The principles of corporation law, applicable in the formation of corporate combinations, relate, generally, to the power of the purchasing corporation to issue stock for property, including good-will, and the method of valuing such property; and to the power of the selling corporations to exchange their property for stock in another corporation.

§ 319. Issue of Stock for Property in Formation of Corporate Combination. — In the formation of a corporate combination,

¹ See *ante*, § 310: "*Formation of Corporate Combinations.*"

payment for the plants and properties taken over is nearly always made in the stock of the purchasing corporation.

The available cash is often required for a working capital and, moreover, the payment of cash for plants would eliminate the vendor corporations from the transaction. A corporate combination, while in the form of a purchase and sale of properties, in reality is a union of interests, and the issue of stock of the purchasing corporation, directly or indirectly, to the stockholders of the several companies, accomplishes the double purpose of paying for the plants acquired and of retaining the interests of the old stockholders in the new corporation.

The transfer of property for an original issue of stock is, strictly speaking, a payment of an informal subscription, the term "sale" applying more exactly to the transfer of stock already issued. The terms "purchase" and "sale" are, however, in common usage, applied to the acquisition by one corporation of the properties of others in exchange for its stock.

The right to issue stock for any property which a corporation has power to acquire is clearly established.¹ Ques-

¹ The following cases are merely illustrative of the current of authority:

United States: Washburn v. National Wall Paper Co., 81 Fed. 17 (1897); Northwestern Mutual Life Ins. Co. v. Exchange Real Est. Co., 70 Fed. 155 (1895); Foreman v. Bigelow, 4 Cliff. 508 (1878). See also Loud v. Pomona, etc. Co., 153 U. S. 564 (1894), (14 Sup. Ct. Rep. 928); Coit v. Gold Amalgamating Co., 119 U. S. 343 (1886), (7 Sup. Ct. Rep. 231); Branch v. Jesup, 106 U. S. 468 (1882), (1 Sup. Ct. Rep. 495); Coe v. East & West R. Co., 52 Fed. 531 (1892).

Alabama: Frenkel v. Hudson, 82 Ala. 158 (1887), (2 So. Rep. 758, 60 Am. Rep. 736).

Georgia: Hayden v. Atlanta Cotton Factory, 61 Ga. 233 (1878).

Illinois: Farwell v. Great West. Tel. Co., 161 Ill. 522 (1896), (44 N. E. Rep. 891); Reichwald v. Commercial Hotel Co., 106 Ill. 439 (1883).

Indiana: Coffin v. Ransdell, 110 Ind. 417 (1887), (11 N. E. Rep. 20); Bruner v. Brown, 139 Ind. 600 (1894), (38 N. E. Rep. 318).

Kansas: Walburn v. Chenault, 43 Kan. 352 (1890), (23 Pac. Rep. 657).

Kentucky: Phillips v. Covington, etc. Bridge Co., 2 Metc. 219 (1859).

Louisiana: Edwards v. Bringier Sugar Ext. Co., 27 La. Ann. 118 (1875).

Maryland: Brant v. Ehlen, 59 Md. 1 (1882).

Massachusetts: New Haven etc. Co. v. Linden Spring Co., 142 Mass. 349 (1886), (7 N. E. Rep. 773); Wyman v. American Powder Co., 8 Cush. 168 (1851).

Michigan: Young v. Erie Iron Co., 65 Mich. 111 (1887), (31 N. W. Rep. 814).

tions may arise as to the valuation of property taken, but the power of a corporation to agree with a subscriber to receive property in payment for stock cannot be questioned at the present day. Only where the governing statute expressly requires payment in money is money's worth insufficient.¹

In form, the transaction is direct. The property is transferred to the corporation, and the stock is issued in exchange therefor. The formality of paying a subscription in money and immediately paying back the money for property is entirely unnecessary.²

Statutes have been passed in many States authorizing corporations, under prescribed conditions, to purchase property by the issue of stock, and to accept property in payment of subscriptions.³ The conditions of such statutes are limitations upon the powers of the corporations.

Minnesota : Hastings Malting Co. v. Iron Range Brewing Co., 65 Minn. 28 (1896), (67 N. W. Rep. 652).

Missouri : Woolfolk v. January, 131 Mo. 620 (1895); Chouteau v. Dean, 7 Mo. App. 210 (1879).

Nebraska : Troup v. Horback, 53 Neb. 795 (1898), (74 N. W. Rep. 326).

New Jersey : Weatherby v. Baker, 35 N. J. Eq. 501 (1882). See New Jersey statute in note 3 *infra*.

New York : Van Cott v. Van Brunt, 82 N. Y. 535 (1880); Barr v. New York, etc. R. Co., 125 N. Y. 263 (1891), (26 N. E. Rep. 145); Gamble v. Queens County Water Co., 123 N. Y. 91 (1890), (25 N. E. Rep. 201).

North Carolina : Clayton v. Ore Knob Co., 109 N. C. 385 (1891), (14 S. E. Rep. 36).

Ohio : Goodin v. Evans, 18 Ohio St. 150 (1868).

Pennsylvania : Shannon v. Stevenson, 173 Pa. St. 419 (1896), (34 Atl. Rep. 218); Johnston v. Markle Paper Co., 153 Pa. St. 189 (1893), (25 Atl. 560).

Tennessee : Shield v. Clifton Hill Land Co., 94 Tenn. 123 (1894), (28 S. W. Rep. 668, 45 Am. St. Rep. 700); Seairight v. Payne, 6 Lea, 283 (1880).

Washington : Kroenert v. Johnston, 19 Wash. 96 (1898), (52 Pac. Rep. 605).

England : *Re Wragg*, 1 Ch. Div. 796 (1897), *Spargo's Case*, L. R. 8 Ch. App. 407 (1873); *Larocque v. Beauchemin*, App. Cas. 358 (1897); *Burkinshaw v. Nichols*, L. R. 3 App. Cas. 1004 (1878).

¹ In *Connecticut*, until 1901, the statute required that twenty per cent of the subscriptions to all joint stock companies should be paid in in cash.

² *Chouteau v. Dean*, 7 Mo. App. 214 (1879): "It is not now questioned that a corporation may issue its stock by way of payment in the purchase of property. This is on the principle that there is no need for the roundabout process of first issuing the stock for money and then paying the money for the property." See also *Liebke v. Knapp*, 79 Mo. 22 (1883), (49 Am. Rep. 212); *Spargo's Case*, L. R. 8 Ch. App. 407 (1873).

³ *New Jersey Corporation Act of 1896*, § 49, p. 293: "Any corporation formed under this act may purchase mines, manufactories or other property necessary for its business, or the stock or any company or companies owning,

§ 320. **Issue of Stock for Good-will in Formation of Corporate Combination.** — In combining the interests of different business establishments into a single corporation, it is essential that they should be taken over as going concerns. The purchasing corporation is organized for the purpose of acquiring, not only the plants and tangible assets of the several companies, but also their business, and issues its stock — usually the common shares — for the purchase of their good-will.

The good-will of a business is property for which stock may lawfully be issued, either at common law or under statutes authorizing the issue of stock “for property actually received”¹ by the corporation.² It has a value independent of the tangible assets of the vendor corporation, may be conveyed separately from them and for a different class of stock, and its value may be fixed by appraisal. The question whether a particular method of appraisal is proper cannot be raised by a party to a combination who has approved of, and participated in, the application of such method in the sale of the good-will of his own business.

mining, manufacturing or producing materials, or other property necessary for its business, and issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be full-paid stock and not liable to any further call, neither shall the holder thereof be liable for any further payment under any of the provisions of this act; and, in the absence of actual fraud in the transaction, the judgment of the directors as to the value of the property purchased shall be conclusive.”

The provision of the English Companies Act of 1867, 30 and 31 Vict. ch. 131, § 25, is as follows: “Every share in any company shall be deemed and taken to have been issued and to be subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the registrar of joint stock companies at or before the issue of such shares.”

¹ *New York Stock Corporation Law* 1892, ch. 688, § 4, as amended by Laws 1901, ch. 354 (Birdseye's R. S. 1901, p. 3418, § 42).

² *Washburn v. National Wall Paper Co.*, 81 Fed. 17 (1897). See also *Beebe v. Hatfield*, 67 Mo. App. 609 (1897); *Pell's Case*, L. R. 5 Ch. App. 11 (1869). But compare *Camden v. Stuart*, 144 U. S. 115 (1892), (12 Sup. Ct. Rep. 585), where the Supreme Court of the United States said: “The experience and good-will of the partners, which it is claimed were transferred to the corporation, are of too unsubstantial and shadowy a nature to be capable of pecuniary estimation in this connection. It is not denied that the experience and good-will of a business may be the subject of barter and sale as between the parties to it, but in a case of this kind there is no proper basis for ascertaining its value, and the claim is evidently an after-thought.”

In *Washburn v. National Wall Paper Co.*¹ Judge Lacombe said: "The first of these propositions suggests the questions whether stock is issued for 'property actually received,' within the meaning of the statute, when it is issued for good-will only; and whether, assuming that the entire stock could, under the New York Act of 1892, be issued solely for good-will, the good-will taken in this case was taken at its actual value. . . . Good-will has been defined as 'all that good disposition which customers entertain towards the house or business identified by the particular name or firm, and which may induce them to continue giving their custom to it.' There is nothing marvellous or mysterious about it. When an individual or a firm or a corporation has gone on for an unbroken series of years conducting a particular business, and has been so scrupulous in fulfilling every obligation, so careful in maintaining the standard of the goods dealt in, so absolutely honest and fair in all business dealings that customers of the concern have become convinced that their experience in the future will be as satisfactory as it has been in the past, while such customers' good report of their own experience tends continually to bring new customers to the same concern, there has been produced an element of value quite as important—in some cases, perhaps, far more important—than the plant or machinery with which the business is carried on. That it is property is abundantly settled by authority, and, indeed, is not disputed. That, in some cases, it may be very valuable property is manifest. The individual who has created it by years of hard work and fair business dealing usually experiences no difficulty in finding men willing to pay him for it, if he be willing to sell it to them. . . . Since good-will is property, and since, in some cases, it is valuable property, it would follow that, in some way or other, it must be practically possible to determine what that value is. Whether the particular method employed in the case at bar to ascertain such value is or is not a proper one, and whether the appraisalment made when these several wall paper concerns

¹ *Washburn v. National Wall Paper Co.*, 81 Fed. 19 (1897).

were bought up by the defendant company was accurate, we are under no obligation to inquire upon the complainants' request. The method of valuation was one which they fully approved, and which was applied in fixing the value of their own property. . . . They certainly, participating in the transaction, and reaping its benefits, are in no position now to claim that the good-will bought by the defendant company with common stock was overvalued."

§ 321. **Over-valuation of Property acquired by Issue of Stock.** — The formation of every corporate combination is in the nature of an experiment, entered into for the anticipated benefit of the owners of the several establishments entering the combination. The stock of the new corporation is, necessarily, of uncertain value. The valuation to be placed upon the various plants and the good-will of the business of each company cannot be reached by the application of any hard and fast rule.

In determining the amount of stock to be issued for property, including good-will, under such circumstances, the only requirement is that the contracting parties shall act in good faith in the transaction. As said by Judge Bunn in *Dickerman v. Northern Trust Co.*:¹ "Assuming that the stock of the new company was of par value, and that the plants were worth only the prices fixed upon them in the several options, of course there would appear to be an over-valuation in the sale. But this is an assumption that would scarcely be warranted. Probably there was not much market value for the stock, especially the common and unpreferred stock. It was supposed that the new enterprise would make the plants more valuable, so that the value of any plant before the transfer would not be evidence of its value after the consolidation should be completed. Every one interested proceeded with his eyes open, and it was entirely competent to make such a contract as they might agree upon. There was no compulsion practiced and no evidence of fraud. The mill owners could set such valuation upon their plants as they chose, or as they could agree upon with those taking

¹ *Dickerman v. Northern Trust Co.*, 80 Fed. 453 (1897).

the options. The holders of options and the new company, in the absence of fraud, could do the same thing and make such bargain for the transfer as they saw fit."

When stock has been issued as fully paid up, in exchange for property acquired, the weight of authority supports the view that mere over-valuation is not sufficient to invalidate the issue, and that fraud, actual or constructive, must be shown;¹ and the same rule is sometimes provided by statute.²

¹ I. *Cases holding that, unless the over-valuation of the property is intentional and, consequently, fraudulent, the issue of stock cannot be attacked or the stock treated as only partially paid up.*

United States: Coit v. Gold Amalgamating Co., 119 U. S. 345 (1886), (7 Sup. Ct. Rep. 231); Dickerman v. Northern Trust Co., 80 Fed. 450 (1897); Northwestern Mut. Life Ins. Co. v. Exchange Real Est. Co., 70 Fed. 157 (1895); Du Pont v. Tilden, 42 Fed. 87 (1890); Phelan v. Hazard, 5 Dill. 45 (1878).

Indiana: Bruner v. Brown, 139 Ind. 600 (1894), (38 N. E. Rep. 318); Coffin v. Ransdell, 110 Ind. 417 (1887), (11 N. E. Rep. 20).

Maryland: Brant v. Ehlen, 59 Md. 1 (1882).

Minnesota: Hastings Malting Co. v. Iron Range Brew. Co., 65 Minn. 28 (1896), (67 N. W. Rep. 653).

Michigan: Young v. Erie Iron Co., 65 Mich. 111 (1887), (31 N. W. Rep. 814).

Nebraska: Troup v. Horbach, 53 Neb. 795 (1898), (74 N. W. Rep. 326).

Compare Gilkie, etc. Co. v. Dawson, etc. Co., 46 Neb. 333 (1895), (64 N. W. Rep. 978).

New Jersey: Bickley v. Schlag, 46 N. J. Eq. 533 (1890), (20 Atl. Rep. 250). See, however, Weatherby v. Baker, 35 N. J. Eq. 501 (1882).

New York: Seymour v. Spring Forest Cem. Ass'n, 144 N. Y. 333 (1895), (39 N. E. Rep. 365); Schenck v. Andrews, 57 N. Y. 133 (1874); Powers v. Knapp, 85 Hun, 38 (1895), (32 N. Y. Supp. 622).

North Carolina: Clayton v. Ore Knob

Co., 109 N. C. 385 (1891), (14 S. E. Rep. 36).

Pennsylvania: American Tube, etc. Co. v. Hays, 165 Pa. St. 489 (1895), (30 Atl. Rep. 936); Carr v. Le Fevre, 27 Pa. St. 413 (1856).

Tennessee: Kelley v. Fletcher, 94 Tenn. 1 (1895), (28 S. W. Rep. 1099); Jones v. Whitworth, 94 Tenn. 602 (1895), (30 S. W. Rep. 736).

Washington: Kroenert v. Johnston, 19 Wash. 96 (1898), (52 Pac. Rep. 605).

England: *In re Wragg*, 1 Ch. Div. 796 (1897); Curries Case, 3 De Gex, J. & S. 367 (1863).

Canada: *In re Hess Mfg. Co.*, 23 Can. S. C. 644 (1894).

II. *Cases holding that proof of over-valuation, even without fraud, leaves the stock only paid up to the extent of the true value.*

United States: Altenburgh v. Grant, 85 Fed. 345 (1897), construing peculiar provision of Kentucky constitution.

Alabama: Roman v. Dimmick, 115 Ala. 233 (1897), (22 So. Rep. 109).

Illinois: Sprague v. National Bank, 172 Ill. 149 (1898), (50 N. E. Rep. 19).

Missouri: Van Cleve v. Berkey, 143 Mo. 109 (1898), (44 S. W. Rep. 743).

Ohio: Gates v. Tippecanoe Stone Co., 57 Ohio St. 60 (1897), (48 N. E. Rep. 285).

Utah: Salt Lake Hardware Co. v. Tintic Mill. Co., 13 Utah, 423 (1896), (45 Pac. Rep. 200).

² *New Jersey Corporation Act of 1896*, § 49, p. 293. See note to § 319, *ante*.

Gross and obvious over-valuation would, however, make the transaction presumptively fraudulent.¹

Constitutional provisions have been adopted and statutes enacted, in many States, against the fictitious issue of stock. A consideration of these provisions and of the remedies of creditors or stockholders in the case of watered stock, belongs, more appropriately, in a treatise upon general corporation law.

§ 322. **Power of Vendor Corporations to sell Properties for Stock of Purchasing Corporation.** — The general principles of law governing the exchange of corporate property for stock in other corporations, which have already been fully considered, are applicable in the case of the formation of a corporate combination and do not require further examination.²

§ 323. **Corporate Combinations through Formation of Holding Corporations.** — Corporate combinations have sometimes been created by the formation of a corporation to acquire control of several competing corporations, through the ownership of a majority of their respective shares.

Upon principles elsewhere considered, such holding corporations can only be organized under laws permitting corporations to acquire and hold stock in other corporations. A corporate combination, by means of a holding corporation, therefore, depends for its validity upon the power of such corporation to hold the shares of the several subsidiary companies. In the absence of such power, the combination is invalid, and the holding corporation is liable to be proceeded against in *quo warranto*, entirely irrespective of the question whether the combination is opposed to public policy.³

¹ *Coit v. Gold Amalgamating Co.*, 119 U. S. 343 (1886), (7 Sup. Ct. Rep. 231); *Lloyd v. Preston*, 146 U. S. 630 (1892); *Coleman v. Howe*, 154 Ill. 458 (1895), (39 N. E. Rep. 725); *Hastings Malting Co. v. Iron Range Brew. Co.*, 65 Minn. 28 (1896), (67 N. W. Rep. 652).

² See *ante*, subdiv. II. ch. 11: "*Exchange of Property of One Corporation for*

Stock of Another." See also *ante*, § 281: "*Power to take Stock in Exchange for Corporate Assets.*"

³ *People v. Chicago Gas Trust Co.*, 130 Ill. 268 (1889), (22 N. E. Rep. 798, 17 Am. St. Rep. 319), is the leading case illustrating the principles governing this form of corporate combination.

In this case the Court said (p. 288): "Our conclusion, upon this branch of

ARTICLE II.

COMBINATIONS AS AFFECTED BY PRINCIPLES OF
COMMON LAW AND PUBLIC POLICY.

CHAPTER XXXI.

APPLICATION OF LAW OF CONSPIRACIES.

- § 324. Definition and Classification of Conspiracies.
 § 325. Criminal and Civil Conspiracies distinguished.
 § 326. Applicability of Law of Conspiracies to Corporations.
 § 327. What Combinations are Conspiracies.
 § 328. Modern Combinations of Capital seldom Conspiracies.

§ 324. **Definition and Classification of Conspiracies.**—A conspiracy is a species of the genus combination, and may be broadly defined as a combination to effect an illegal object, as an end or means; or, in the language of Lord Denman,¹ “to do an unlawful act, or a lawful act by unlawful means.”²

the case, is, that if the Chicago Gas Trust Company be regarded as a corporation formed for the purpose of erecting or operating gas-works and manufacturing and selling gas, it has no power to purchase and hold or sell shares of stock in other gas companies, as an incident to such purpose of its formation, even though such power is specified in the articles of incorporation.”

For statement of the facts in this case, see *post*, § 346: “*Basis of Rule — (E) Case of the Chicago Gas Trust.*” See also *ante*, § 264: “*Necessity for Statutory Authority to purchase Stock. Rule in United States.*”

¹ *Jones’ Case*, 4 B. & Ad. 349 (1832).

² *United States. Pettibone v. United States*, 148 U. S. 203 (1893), (13 Sup. Ct. Rep. 542): “A conspiracy is sufficiently described as a combination of two or more persons, by concerted action, to accomplish a criminal or unlaw-

ful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means.” See also *United States v. Cassidy*, 67 Fed. 698 (1895).

Illinois. Smith v. People, 25 Ill. 17 (1860), (76 Am. Dec. 780).

Maine. State v. Bartlett, 30 Me. 134 (1849): “A conspiracy at common law consists in the unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, or in the unlawful agreement to compass or promote a purpose not in itself criminal or unlawful, by criminal or unlawful means.”

Massachusetts. Commonwealth v. Waterman, 122 Mass. 57 (1877): A conspiracy is “the combination of two or more [persons] to do something unlawful, either as a means or as an ultimate end.”

Michigan. Alderman v. People, 4 Mich. 414 (1857), (69 Am. Dec. 321).

Conspiracies are of two kinds, criminal and civil. A criminal conspiracy is a combination of two or more persons to accomplish, by concerted action, a criminal or unlawful object; or a lawful object, by criminal or unlawful means.¹

A civil conspiracy is a combination of two or more persons to accomplish, by concerted action, an unlawful or oppressive object; or a lawful object, by unlawful or oppressive means — resulting in damage.²

¹ See definitions in preceding note.

In *Commonwealth v. Hunt*, 4 Met. (Mass.) 123 (1842), Chief Justice Shaw thus defined a criminal conspiracy: "A conspiracy must be a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not criminal or unlawful, by criminal or unlawful means."

The term "unlawful," in addition to the term "criminal," was used, said the Chief Justice, because "it is manifest that many acts are unlawful which are not punishable by indictment or other public prosecution; and yet there is no doubt, we think, that a combination by numbers to do them would be an unlawful conspiracy, and punishable by indictment."

As to the use of the phrase "by concerted action," see *United States v. Cassidy*, 67 Fed. 698 (1895); *Alderman v. People*, 4 Mich. 424 (1857), (69 Am. Dec. 321).

The manifest difficulty of stating a rule for determining what acts, unlawful but not criminal when committed by an individual, constitute a criminal offence when committed by a combination of individuals, was considered by the Supreme Court of Errors of Connecticut in *State v. Glidden*, 55 Conn. 70 (1887), (8 Atl. Rep. 890). "It has often been said that a conspiracy to effect an unlawful purpose, or a lawful purpose by unlawful means, is an offence. But this is said to be a limitation rather than a definition. It certainly lacks definiteness. Many acts are said to be unlawful which would not be the subject of a criminal conspiracy.

Other acts are unlawful because they are in violation of the criminal law or some penal statute. If the end or means are criminal in themselves, or contrary to some penal statute, the conspiracy is clearly an offence. Between these two extremes a great variety of cases may arise, many of which ought not to be regarded as criminal. . . . If we were to attempt to give a rule applicable to this branch of the subject, we should say that it is a criminal offence for two or more persons, corruptly or maliciously to confederate and agree together to deprive another of his liberty or property. Such a rule is proximately correct and practically just."

The theory that acts merely unlawful may become criminal when done in concert is supported by the authorities to such an extent that the writer has felt obliged to follow it in formulating a definition of a criminal conspiracy. It is difficult, however, to support it upon principle. Mere concert of action — except when involving force or false statement — is not, in itself, criminal; and if neither the object nor means are criminal wherein lies the criminality? See, in this connection, *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223 (1893). (55 N. Rep. 119).

² The same combination, of course, may amount to a criminal as well as a civil conspiracy. Acts constituting a criminal conspiracy, if accompanied with damage, may also subject the conspirators to a civil action.

For consideration of the element of damage in civil conspiracies, see next section.

§ 325. **Criminal and Civil Conspiracies distinguished.** — A criminal and a civil conspiracy, aside from the element of criminality, may be distinguished from the fact that the gist of the action in case of the one is merely an act of aggravation in the other.¹

The gist of the offence of criminal conspiracy is the *combination*. The offence is complete when the confederacy is made, and no overt act is necessary. Any act in pursuance of the combination is matter of aggravation.²

Damage is essential to a right of action for civil conspiracy. It is the gravamen of the charge, and the combination is only a matter of aggravation.³

¹ In *Van Horn v. Van Horn*, 52 N. J. L. 286 (1890), (20 Alt. Rep. 485), the Court said: "It is not necessary to consider the office of the ancient writ of conspiracy, and the process by which, in time, it was superseded by the later and more efficacious action on the case for conspiracy, and the still more modern action for malicious prosecution. Nor will it now be advantageous to show how long and difficult it was to separate the idea of a criminal conspiracy at common law, where the agreement or conspiracy was the *gravamen* of the offence, from the real complaint in a civil action, that the combination of two or more persons has enabled them to inflict a great wrong on the plaintiff. The combination or conspiracy in the latter case was, therefore, a matter of aggravation or inducement only, of which one or all might be found guilty, while in the former it was essential to show that two or more had joined in an agreement to do an unlawful act, or to do a lawful act in an unlawful manner. The distinction is now well established, that in civil actions the conspiracy is not the *gravamen* of the charge."

² *Commonwealth v. Judd*, 2 Mass. 329 (1807), (*per* Parsons, C. J.): "The gist of a conspiracy is the unlawful confederacy to do an unlawful act, or even a lawful act for unlawful purposes; the offence is complete when the confederacy is made; and any act done in

pursuance of it is no constituent part of the offence, but merely an aggravation of it. The rule of the common law is to prevent unlawful combinations. . . . The unlawful confederacy is, therefore, punished to prevent the doing of any act in execution of it."

People v. Sheldon, 139 N. Y. 264 (1893), (34 N. E. Rep. 785): "The gravamen of the offence of conspiracy is the combination. Agreements to prevent competition in trade are, in contemplation of law, injurious to trade, because they are liable to be injuriously used."

Both of these opinions refer to *criminal* conspiracies and are indicative of the uniform current of authority that, unless expressly provided by statute (as is sometimes the case), proof of an overt act is not necessary in a prosecution for conspiracy; nor is it necessary to set forth such act in the indictment.

³ *Robertson v. Parks*, 76 Md. 135 (1892), (24 Atl. Rep. 413): "It is a general rule, that a conspiracy cannot be made the subject of a civil action, unless something is done which, without the conspiracy, would give a right of action. The damage done is the gist of the action, not the conspiracy. Where the mischief contemplated is accomplished, the conspiracy becomes important, as it may affect the means and measures of redress. The party wronged

§ 326. **Applicability of Law of Conspiracies to Corporations.** — The law of civil conspiracies is equally applicable to corporations and to individuals. A combination of corporations for an unlawful or oppressive object — as an end or means — is a conspiracy, if a similar combination of natural persons would amount to a conspiracy; and the converse of the proposition is equally true.

In *Buffalo Lubricating Oil Co. v. Standard Oil Co.*¹ the Court said: “We entertain no doubt that an action against a corporation may be maintained to recover damages caused by conspiracy. . . . If actions can be maintained against corporations for malicious prosecution, libel, assault and battery, and other torts, we can perceive no reason for holding that actions may not be maintained against them for conspiracy. It is well settled by the authorities cited, that the malice and wicked intent needful to sustain such actions may be imputed to corporations.”

Upon similar principles, it would seem that a combination of corporations for a criminal object would amount to a criminal conspiracy, if such would be the result of a combination of individuals for the same purpose. In several States, the anti-trust laws expressly provide that corporations, as well as natural persons, violating their provisions, shall be guilty of the crime of conspiracy.²

may look beyond the actual participants in committing the injury, and join with them as defendants all who conspired to accomplish it; and the fact of conspiracy may aggravate the wrong; but the simple act of conspiracy does not furnish a substantial ground of action.”

Doremus v. Hennessey, 62 Ill. App. 402 (1895): “A civil action will not lie for a mere conspiracy. It is the damage done in pursuance of the conspiracy which gives the right of action. It is now well established that, in civil actions, the conspiracy is not the gravamen of the charge, but may be pleaded and proved in aggravation of the wrong of which the plaintiff complains, and as enabling him to recover against all the conspirators, as joint tortfeasors.”

See also *Adler v. Fenton*, 24 How. (U. S.) 407 (1860); *Van Horn v. Van Horn*, 52 N. J. L. 284 (1890), (20 Atl. Rep. 485); *Kimball v. Harman*, 34 Md. 407 (1871); *Stevens v. Rowe*, 59 N. H. 578 (1880), (47 Am. Rep. 231). *Hutchins v. Hutchins*, 7 Hill, 104 (1845).

¹ *Buffalo Lubricating Oil Co. v. Standard Oil Co.*, 106 N. Y. 670 (1887), (12 N. E. Rep. 826).

² *The Missouri* anti-trust act (see *post*, § 405) provides in its first section that any corporation, individual or other association of persons, entering into any combination in violation of its provisions, “shall be deemed and adjudged guilty of a conspiracy to defraud.” In *National Lead Co. v. Grote Paint Store Co.*, 80 Mo. App. 247 (1899),

§ 327. **What Combinations are Conspiracies.** — A combination amounts to a criminal conspiracy only when the end or means are criminal or unlawful. A combination amounts to a civil conspiracy only when the ends or means are unlawful or oppressive, and the legal rights of others are infringed. Whether a particular combination is a conspiracy depends, therefore, upon its object, and the means adopted for accomplishing it. The question of motive may also be of importance.

Thus in the celebrated *Mogul Steamship Case*¹ Lord Chief

the Missouri Court of Appeals, referring to this statute, said: "By the language of the first section of that enactment a violation of its provisions is made a crime, i. e. 'a conspiracy to defraud.' And in discussing the liability of a corporation for its violation the Court said (p. 269): "A corporation can only act through its members or their agents. The corporate entity with which the law clothes it for special purposes is not self-acting, hence there was no thought of its action only in the mind of the framers of the statute. The evident purpose of the legislature was to specify certain acts, which, if done by its stockholders or governing bodies, should constitute a crime on the part of the corporation. It did not contemplate the commission of an offence by an impalpable abstraction, which could neither think nor act; but it intended to bind this corporate entity by the imputed actions of its human agencies."

In *State v. Firemen's Fund Ins. Co.*, 152 Mo. 37 (1899), (52 S. W. Rep. 595), the Supreme Court of Missouri discussed the applicability of the same law to insurance companies:

"It could not be tolerated for a moment that an insurance company could hide under the skirts of its agents and violate the anti-trust laws of our State with impunity . . . The company can and must control its agents, and must see, at its peril, that its agents do not violate the law while attending to the business of the company. This is

the rule as to libels, assaults, malicious torts by agents of incorporated companies, and there is greater reason for it being the true rule in cases involving the anti-trust laws."

¹ *Mogul Steamship Co. v. McGregor*, L. R. 21 Q. B. 552 (1888). This is the leading case upon the law of conspiracies as applied to trade competition, and, in its various stages, is reported in L. R. 15 Q. B. 476 (1885), L. R. 21 Q. B. 544 (1888), L. R. 23 Q. B. 598 (1889), L. R. 17 App. Cas. (1891) 25. In this case certain owners of steam vessels trading between China and England, for the purpose of obtaining a monopoly of the homeward tea trade and maintaining the rates of freight thereon, formed an association, and offered to all shippers of tea who used exclusively the vessels of members of the association a rebate of five per cent on all freights. The plaintiffs, who were rival ship owners, were excluded from the benefits of the association to their damage, as alleged, and they instituted an action for the recovery of damages and for an injunction. The gist of the plaintiffs' case, as stated, was a *conspiracy* on the part of the respondents to prevent the plaintiffs from obtaining cargoes for their steamers. A motion for a preliminary injunction was denied (L. R. 15 Q. B. 476) (1885), upon the ground that, although a conspiracy to obtain a monopoly of a carrying trade might constitute an actionable conspiracy, irreparable damage warranting an injunction had

Justice Coleridge said: "I do not doubt the acts done by the defendants here, if done wrongfully and maliciously, or if done in furtherance of a wrongful and malicious combination, would be ground for an action on the case at the suit of one who has suffered injury from them. The question comes at last to this: What was the character of those acts, and what was the motive of the defendants in doing them?"

A combination entered into for the malicious purpose of injuring a person in his business may amount to a conspiracy, and furnish a ground of action for the damage sustained. The essential element of a conspiracy — the unlawful end or means — may be the intentional doing of acts detrimental to the business of a competitor, without justification or excuse. But combinations without such ulterior object, and merely for the purpose of promoting, by lawful means, the common interests of the parties, are not conspiracies. A trader or manufacturer has the right to push his trade or business in a lawful manner, although his success may necessarily involve loss to his competitors. So, several traders and manufacturers may combine for mutual advantage and, so long as the *motive* is not malicious, the *object* not unlawful or oppressive, and the *means* neither deceitful nor fraudulent, the result is not a conspiracy, although it may necessarily work injury to other persons engaged in the same business. The essential question is whether the object of a combination is to do harm to others or to exercise the rights of the association for its own benefit.¹

not been shown. The case then came before Lord Coleridge (C. J.), who held (L. R. 21 Q. B. 544) (1888), that the essential element of "*unlawfulness*" in the combination had not been shown and rendered judgment for the defendants. The case then went to the Court of Appeal, which, by a majority of its members, held that the association, being formed by the defendants merely for the purpose of winning trade and without any malice or ill-will towards the plaintiffs or with the intention of ruining their trade, did not constitute a conspiracy, and rendered judgment for

the defendant. The case was then taken to the House of Lords and the judgment affirmed upon the same grounds (L. R. 17 App. Cas. (1891) 25).

¹ In the *Mogul Steamship Case* (L. R. 23, Q. B. 614) (1889), Lord Justice Bowen of the Court of Appeal considered at length the principles stated in the text:

"What, then, are the limitations which the law imposes on a trader in the conduct of his business as between himself and other traders? There seems to be no burdens or restrictions in law upon a trader which arise merely from

§ 328. **Modern Combinations of Capital seldom Conspiracies.** — A combination of industrial corporations for the promotion of their common interests, manifestly can possess the element of criminality only when entered into in violation of some penal statute, or when criminal means are employed; and such a combination becomes a conspiracy, in its civil aspect, only when the element of illegality or oppression is present.¹

the fact that he is a trader, and which are not equally laid on all other subjects of the crown. His right to trade freely is a right which the law recognizes and encourages, but it is one which places him at no special disadvantage as compared with others. No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. . . . But the defendants have been guilty of none of these acts. They have done no more against the plaintiffs than pursue to the bitter end a war of competition waged in the interest of their own trade. . . . I can find no authority for the doctrine that such a commercial motive deprives of 'just cause for excuse' acts done in the course of trade which would but for such motive be justified. So to hold would be to convert into an illegal motive the instinct of self-advancement and self-protection, which is the very incentive to all trade. . . . It is urged, however, on the part of the plaintiffs, that even if the acts complained of would not be wrongful had they been committed by a single individual, they become actionable when they are the result of concerted action among several. In other words, the plaintiffs, it is contended, have been injured by an illegal conspiracy. Of the general proposition, that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise, and the very fact of the com-

bination may shew that the object is simply to do harm, and not exercise one's own just rights. . . . The question to be solved is whether there has been any such [illegal] agreement here. Have the defendants combined to do an illegal act? Have they combined to do a lawful act by unlawful means? A moment's consideration will be sufficient to shew that this new inquiry only drives us back to the circle of definitions and legal propositions which I have already traversed in the previous part of this judgment. The unlawful act agreed to, if any, between the defendants must have been the intentional doing of some act to the detriment of the plaintiffs' business without just cause or excuse. Whether there was any such justification or excuse for the defendants is the old question over again, which, so far as regards an individual trader, has been already solved. The only differentia that can exist must arise, if at all, out of the fact that the acts done are the joint acts of several capitalists, and not of one capitalist only."

¹ *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173 (1871), is the leading case holding a combination of corporations for the suppression of competition a conspiracy. The reasoning of the Court, however, clearly places the illegality of the combination upon grounds of public policy rather than upon principles of the law of conspiracies.

In this case five Pennsylvania coal companies, which controlled the entire production of two mining regions, entered into an agreement relating to production and prices and appointed a supervising committee and a common

A combination of corporations *may* have for its ultimate or immediate object injury to the business of a competitor, or it may be brought about by fraudulent or deceitful means injuriously affecting the public.¹ Such a combination may be a conspiracy, but such combinations have little place in modern business life.

Combinations of capital — whether in the form of associations, trusts or corporate combinations — are formed for the supposed advantage of the associates. The object of the parties is to benefit themselves, not to injure others. The attain-

sales agent. The committee had power to adjust prices and the amount of production of each company was limited. The Court held that the agreement was invalid and amounted to a conspiracy, saying (p. 186): "The effects produced on the public interests lead to the consideration of another feature of great weight in determining the illegality of the contract, to wit: the combination resorted to by these five companies. Singly, each might have suspended deliveries and sales of coal to suit its own interests, and might have raised the price, even though this might have been detrimental to the public interest. There is a certain freedom which must be allowed to every one in the management of his own affairs. When competition is left free, individual error or folly will generally find a correction in the conduct of others. . . . This combination has a power in its confederated form which no individual action can confer. The public interest must succumb to it, for it has left no competition free to correct its baleful influence. When the supply of coal is suspended the demand for it becomes importunate, and prices must rise. Or, if the supply goes forward, the price fixed by the confederates must accompany it. The domestic hearth, the furnaces of the iron master, and the fires of the manufacturer, all feel the restraint, while many dependent hands are paralyzed, and hungry mouths are stinted. The influence of a lack of supply or a rise in the price of an article of such prime

necessity cannot be measured. It permeates the entire mass of the community, and leaves few of its members untouched by its withering blight. Such a combination is more than a contract, it is an offence. . . . In all such combinations, where the purpose is injurious or unlawful, the gist of the offence is the conspiracy. Men can often do by the combination of many what severally no one could accomplish, and even what, when done by one, would be innocent."

See also *People v. Sheldon*, 139 N. Y. 251 (1893), (34 N. E. Rep. 785).

¹ *Fairbanks v. Leary*, 40 Wis. (643) (1876): "The law does not and did not require that these parties should compete in the purchase of produce. Individually each had an undoubted right to bid therefor as low as he pleased. Collectively, they had the same right, unless deception was practised on the public. But if they held themselves out as competing purchasers, and knew that the people who sold in the market where they operated relied upon such competition (as well they might), as a guaranty that they were obtaining the full market value of their produce, while, at the same time, the purchasers were not in competition but in a secret league to depress the market, the agreement under which the latter operated is illegal and void, and no court will lend its aid to enforce any of its stipulations." See also *Craft v. McConoughy*, 79 Ill. 346 (1875).

ment of this object may injuriously affect competitors, but the combination does not, for that reason, become a conspiracy. "The truth is," said Lord Justice Bowen in the *Mogul Steamship Case*,¹ "that the combination of capital for purposes of trade and competition, is a very different thing from such a combination of several persons against one, with a view to harm him, as falls under the head of an indictable conspiracy. There is no just cause or excuse in the latter class of cases. There is such a just cause or excuse in the former. There are cases in which the very fact of a combination is evidence of a design to do that which is hurtful, without just cause,—is evidence—to use a technical expression—of malice. But it is perfectly legitimate, as it seems to me, to combine capital for all the mere purposes of trade for which capital may, apart from combination, be legitimately used in trade. To limit combinations of capital, when used for purposes of competition, in the manner proposed by the argument of the plaintiffs, would, in the present day, be impossible—would be only another method of attempting to set boundaries to the tides."

The fact that a combination, after its formation, may become a party to a conspiracy—may intentionally injure or oppress others—does not relate back to and invalidate the original combination agreement. The combination will be liable for the subsequent conspiracy, but the validity of its organization will depend solely upon the contract as made, and the facts and circumstances attending its execution.

The fact that a combination is against public policy does not make it a conspiracy. If contravening the rules of public policy it is invalid, and it is made no more invalid by designating it a conspiracy. The inexact use of terms in judicial decisions has occasioned much of the confusion attending the law of combinations.

¹ *Mogul Steamship Co. v. McGregor*, L. R. 23 Q. B. 617 (1889).

CHAPTER XXXII.

APPLICATION OF LAW OF MONOPOLIES.

§ 329. Primary Meaning of Term "Monopoly."

§ 330. Growth of Monopolies—Their Illegality.

§ 331. No True Monopolies in United States. Patents and other *Quasi-monopolies*.

§ 332. Modern Use of Term "Monopoly."

§ 333. Direct Test of Validity of Combination not whether it is a Monopoly.

§ 329. **Primary Meaning of Term "Monopoly."** — The meaning of the term "monopoly," used in a historic and exact sense, is best expressed in the early definition of Lord Coke: "A monopoly is an institution, or allowance by the king by his grant, commission, or otherwise, to any person or persons, bodies politicque, or corporate, of, or for, the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politicque or corporate, are sought to be restrained of any freedome, or liberty that thay had before, or hindred in their lawful trade."¹

§ 330. **Growth of Monopolies—Their Illegality.** — Monopolies, of the character described by Lord Coke, were grants from the crown of exclusive rights to control the manufacture or sale of commodities and, while employed by earlier English sovereigns, reached their extreme development in the reign of Queen Elizabeth. She husbanded her own resources at the expense of her people, and rewarded her favorites by grants of innumerable patents for monopolies. The natural result was an increase in price of the necessities of life. "There was scarcely a family in the realm,"

¹ 3 Coke's Inst. 181. This definition of Lord Coke was quoted with approval by Justice Story in his dissenting opinion in the Charles River Bridge Case, 11 Pet. (U. S.) 606 (1837), and by Justice Field in his dissenting opinion in the Slaughter House Cases, 16 Wall. 102 (1872). See also arguments of Holt and Treby, afterwards Chief Justices of the King's Bench, as counsel, in the

celebrated case of East India Co. v. Sandys, 10 How. State Tr. 371 (1684).

A monopoly is "a license or privilege allowed by the king for the sole buying and selling, making, working, or using of anything whatsoever; whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before." 4 Blackst. Com. 159.

says Lord Macaulay,¹ "that did not feel itself aggrieved by the oppression and extortion which the abuse naturally caused. Iron, oil, vinegar, coal, lard, starch, yarn, leather, glass, could be bought only at exorbitant prices."

Relief first came from the courts, and in the great *Case of the Monopolies*,² decided during the reign of Queen Elizabeth, grants of monopolies were held to be void. The common law against monopolies, thus established, was reinforced, after the death of Elizabeth, by the Statute 21 James I. ch. 3, which provided that all grants of monopolies, with a few exceptions, were "altogether contrary to the laws of this realm and so are and shall be utterly void and of none effect and in no wise to be put in use or execution."

The English common law, including the Statute of James I. against monopolies, is the basis of American jurisprudence,³ and a monopoly, in the sense in which the term has

¹ Macaulay's *History of England*, vol. 1, p. 58.

² *Darcy v. Allein*, Coke, Part 11, 86 b (1602), (Noy, 173). In this case it was declared that a patent from Queen Elizabeth conferring upon Darcy the exclusive privilege of manufacturing playing cards for twenty-one years was a monopoly and void, as being against public policy. The Court stated the following incidents of monopolies:

(a) "The price of the same commodity will be raised, for he who has the sole selling of any commodity, may and will make the prices as he pleases. . . .

(b) "The second incident to a monopoly is that, after the monopoly is granted, the commodity is not so good and merchantable as it was before: for the patentee having the sole trade, regards only his private benefit, and not the commonwealth.

(c) "It tends to the impoverishment of divers artificers and others, who, before, by the labor of their hands, in their art or trade, had maintained themselves and their families, who now will of necessity be constrained to live in idleness and beggary."

³ Justice Field, in his dissenting

opinion in the *Slaughter House Cases*, 16 Wall. (U. S.) 104 (1872), said: "The common law of England is the basis of the jurisprudence of the United States. It was brought to this country by the colonists, together with the English statutes, and was established here so far as it was applicable to their condition. The law and the benefit of such of the English statutes as existed at the time of their colonization, and which they had by experience found to be applicable to their circumstances, were claimed by the Congress of the United Colonies in 1774 as a part of their 'indubitable rights and liberties.' Of the statutes, the benefits of which was thus claimed, the statute of James I. against monopolies was one of the most important. And when the Colonies separated from the mother country no privilege was more fully recognized or more completely incorporated into the fundamental law of the country than that every free subject in the British empire was entitled to pursue his happiness by following any of the known established trades and occupations of the country, subject only to such restraints as equally affected all

been used — if ever granted — would be illegal and void in this country, independent of statutory enactment.

§ 331. **No True Monopolies in United States. Patents and other Quasi-monopolies.** — A monopoly in its primary sense is, stating essential elements, (a) a grant from the State of (b) an exclusive privilege whereby (c) a class of persons are deprived of privileges previously enjoyed.

There are no monopolies of this character in the United States. Combinations of corporations for the purpose of suppressing competition may possess the last two elements. They may obtain for themselves the absolute control of the market for an article of necessity, and thus restrain others "from that liberty of manufacturing and selling which they had before." Such combinations may be against public policy and illegal, but they are not monopolies, strictly speaking, because the essential element — a legislative grant — is lacking.

Patents, copyrights and grants of exclusive franchises are denominated monopolies, and a patent is sometimes selected as an illustration of a true monopoly.¹ They have the first two elements of a monopoly, but not the last. They are legislative grants of exclusive privileges, but they do not necessarily encroach upon existing rights. Patents are granted for new inventions, and copyrights for new books. Grants of exclusive franchises for the operation of public utilities not previously existing, do not deprive any class of persons of privileges possessed. Patents, copyrights and exclusive franchises are, however, in the nature of monopolies, and may properly be designated *quasi-monopolies*.

others. The immortal document which proclaimed the independence of the country declared as self-evident truths that the Creator had endowed all men 'with certain inalienable rights, and that among these are life, liberty, and the pursuit of happiness, and that to secure these rights governments are instituted among men.'"

¹ Edison Electric Light Co. v. Sawyer-Man Electric Co., 53 Fed. 598 (1892):

"The present complainants are entitled, by the patent laws, to a monopoly, for the term of the patent, of the manufacture and sale of the lamps made under it. The right to this monopoly is the very foundation of the patent system."

Letters patent for new inventions for limited periods were expressly excepted from the operation of the statute against monopolies. 21 James I., ch. 3 (1624).

§ 332. **Modern Use of Term "Monopoly."** — The principal injury to the public resulting from the grant of monopolies arose from the exercise of the power to control and, consequently, to enhance the prices of commodities of commerce — especially, of the necessities of life. This power, however, may be practically acquired by agreement, as well as by grant. When, by a combination between manufacturers or traders, the control of the market for a commodity is concentrated in the hands of a single company or association of companies, the evils attending the unrestrained control of prices may result.

The possible effect of combinations being, therefore, the same as the effect of the early monopolies, the term "monopoly," in modern times, is used to describe such combinations, and has acquired a much broader meaning than that originally attaching to it.¹ As so used, it may be broadly defined

¹ The meaning now attached to the word "monopoly" is indicated by the following extracts from judicial decisions in different States:

California. *Herriman v. Menzies*, 115 Cal. 16 (1896), (44 Pac. Rep. 660, 56 Am. St. Rep. 81, 85 L. R. A. 319): "A monopoly exists where all, or nearly all, of an article of trade or commerce within a community or district is brought within the hands of one man or set of men so as to practically bring the handling or production of the commodity or thing within such single control, to the exclusion of competition or free traffic therein. Anything less than this is not monopoly. Webster defines it as the sole power of dealing in any species of goods, and Bouvier as the abuse of free commerce, by which one or more individuals have procured the advantage of selling all of a particular kind of merchandise. And these definitions accord with that given by later writers. Spelling, *Trusts*, § 133. An agreement, the purpose or effect of which is to create a monopoly, is unlawful if it relate to some staple commodity, or thing of general requirement

and use or of necessity, and not some thing of mere luxury or convenience."

Illinois. *People v. Chicago Gas Trust Co.*, 130 Ill. 294 (1889), (22 N. E. Rep. 798, 17 Am. St. Rep. 319): "Contracts creating monopolies are null and void as being contrary to public policy." (Quoting from 2 Addison on Cont. 743.)

Craft v. McConoughy, 79 Ill. 349 (1875): "In other words, the four firms, by a shrewd, deep laid, secret combination, attempted to control and monopolize the entire grain trade of the town and surrounding country."

Iowa. *Chapin v. Brown*, 83 Iowa, 162 (1891), (48 N. W. Rep. 1074): "The agreement is against public policy. It plainly tends to monopolize the butter trade at Storm Lake and destroy competition in that business."

Michigan. *Richardson v. Buhl*, 77 Mich. 658 (1889), (43 N. W. Rep. 1102), ("Diamond Match Case"): "All combinations among persons or corporations for the purpose of raising or controlling the prices of merchandise, or any of the necessities of life, are monopolies and intolerable, and ought to receive the condemnation of all courts."

as the concentration of business in the hands of a few. In the initial decision in the *Sugar Trust Case*,¹ Judge Barrett said: "The monopoly with which the law deals is not limited to the strict equivalent of royal grants or people's patents. Any combination, the tendency of which is to prevent competition in its broad and general sense and to control, and thus at will enhance prices, to the detriment of the public, is a monopoly."

§ 333. **Direct Test of Validity of Combination not whether it is a Monopoly.**—As already shown, grants of monopolies were invalid at common law even before the enactment of the Statute 21 James I., and—the common law being the

New York. *De Witt Wire Cloth Co. v. New Jersey Wire Cloth Co.*, 16 Daly, 529 (1891), (14 N. Y. Supp. 279): "Neither need the agreement or combination, in order to expose it to the denunciation of the law, constitute a complete monopoly or effect a total suppression of competition."

Ohio. *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 672 (1880): "The clear tendency of such an agreement is to establish a monopoly, and to destroy competition in trade, and for that reason, on grounds of public policy, courts will not aid in its enforcement."

Pennsylvania. *Nester v. Continental Brewing Co.*, 2 Dist. R. 177 (1894): "Where a pool or combination reserves the right to regulate prices, they can, by the manipulation of prices, drive their competitors out of business, create a monopoly, and enhance at their pleasure the prices to consumers."

Texas. The constitution of Texas declares: "Peperuities and monopolies are contrary to the genius of a free government, and shall never be allowed." Const. 1876, Art. I. § 26. In construing this provision it was said by a federal court (*Laredo v. International Bridge, etc. Co.*, 66 Fed. 246) (1895): "There are classes of exclusive privileges which certainly do not amount to 'monopolies,' within the meaning of the com-

mon law or of the Texas constitution. Courts of last resort have generally refrained from propounding an authoritative affirmative definition of the "monopoly" so odious to the common law and to the genius of a free government. It would try the power of expression of most judges, if not of human speech, to frame such a definition, outside of which a grant or contract must wholly and clearly rest to escape the stroke of nullity."

The *Texas* anti-trust act of May 25, 1899 (Acts 1899, p. 246; Supp. Sayles' Tex. Civ. Stat. 1897, vol. 2, p. 214, thus defines a monopoly: "A 'monopoly' is any union or combination or consolidation or affiliation of capital, credit, property, assets, trade, custom, skill or acts, or of any other valuable thing or possession, by or between persons, firms or corporations, or associations of persons, firms or corporations, whereby any one of the purposes or objects mentioned in this act is accomplished or sought to be accomplished, or whereby any one or more of said purposes are promoted or attempted to be executed or carried out, or whereby the several results described herein are reasonably calculated to be produced." See *post*, § 405.

¹ *People v. North River Sugar Ref. Co.*, 54 Hun (N. Y.), 377 (1889), *note*.

basis of American law — such monopolies are illegal and void in the United States.

A modern combination of capital, however, for the purpose of controlling the market for a commodity, is not founded upon legislative concession and does not amount to a monopoly, according to the common law use of that term. It may, however, fall within the broad definition of a monopoly already stated; but, in that case, the test of its validity is a rule of public policy, rather than common law principles applicable to monopolies of an essentially different nature. Such a combination is invalid, not because it is a monopoly but because it is against public policy. The statement in judicial decisions that “whatever tends to create a monopoly is unlawful as being contrary to public policy,”¹ merely states an intermediate and unnecessary standard of validity. The essential question is whether a combination — the result of certain agreements and acts — is against public policy; and no useful purpose is served in determining whether it may not also properly be denominated a monopoly, according to the modern use of that term.

In view of the confused state of the law upon the question of the validity of combinations, it is necessary, in formulating any rule, to reduce the legal principles involved to their simplest and most exact terms, and, in so doing, the use of the term “monopoly,” although commonly employed in modern decisions, seems undesirable.

¹ *People v. Chicago Gas Trust Co.*, 17 Am. St. Rep. 319; *Stanton v. 130 Ill. 293* (1889), (22 N. E. Rep. 798, *Allen*, 5 Denio (N. Y.), 434 (1848).

CHAPTER XXXIII.

APPLICATION OF LAW OF CONTRACTS IN RESTRAINT OF TRADE.

§ 334. Definition and Nature of "Contract in Restraint of Trade."

§ 335. Connection between Contracts in Restraint of Trade and Corporate Combinations.

§ 336. Modern Use of Phrase "Contract in Restraint of Trade."

§ 337. Direct Test of Validity of Combination not whether it is in Restraint of Trade.

§ 334. Definition and Nature of "Contract in Restraint of Trade." — The phrase "contract in restraint of trade," according to its primary and historic meaning, may be defined as a contract entered into by a person, — ancillary to a principal contract to which he is a party,¹ — wherein he binds himself, for a consideration, not to engage in a particular trade, business or occupation, for a stated term, within a prescribed territory.²

Contracts of this nature are usually entered into by vendors upon the sale of a business, property or practice, with the good-will attaching thereto, and are necessary in order to make the transfer of the good-will effective. They may, however, when conformable to governing principles, lawfully be entered into as ancillary to various other contracts.

In *United States v. Addyston Pipe, etc. Co.*³ Judge Taft, speaking for the Circuit Court of Appeals, said: "Covenants in partial restraint of trade are generally upheld as valid when they are agreements (1) by the seller of property or business, not to compete with the buyer in such a way as to

¹ *Chappell v. Brockway*, 21 Wend. (N. Y.) 162 (1839): "A man cannot for money alone, where he has no other interest in the matter, purchase a valid contract in restraint of trade, however limited may be the circle of its operation."

See also *Fox, etc. Steel Co. v. Schoen*, 77 Fed. 29 (1896); *United States v. Addyston Pipe, etc. Co.*, 85 Fed. 271 (1898).

² "Strictly speaking, a contract in restraint of trade is any contract whereby any party binds himself not to follow some particular occupation, trade, calling or profession, or engage in some particular business or enterprise for a period within a particular territory."

³ *Eddy on Combinations*, § 688.

⁴ *United States v. Addyston Pipe, etc. Co.*, 85 Fed. 281 (1898).

derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner, pending the partnership, not to do anything to interfere, by competition or otherwise, with the business of the firm; (4) by the buyer of property not to use the same in connection with the business retained by the seller; and (5) by an assistant, servant, or agent not to compete with his master or employer after the expiration of his time of service."

§ 335. **Connection between Contracts in Restraint of Trade and Corporate Combinations.** — Contracts in restraint of trade, as defined in the preceding section, have but an incidental connection with combinations of corporations. A vendor corporation, and the persons interested in it, as ancillary to the contract of sale, might agree with the purchasing corporation, in the formation of a corporate combination, not to engage in the same business again. Such an agreement, if within the limitations applicable to such contracts, would be, strictly, a contract in restraint of trade. But the principal contract between the corporations — even though designed to suppress competition — could only be referred to as a contract in restraint of trade by ignoring the meaning originally attaching to that phrase.

While conventional contracts in restraint of trade are only of adventitious interest in considering the legal principles governing combinations of corporations, it may be noted that the law concerning such contracts, as laid down by the courts, has undergone a process of relaxation — from strict disapproval to liberal enforcement. As said by Lord Macnaghten in the leading case of *Nordenfelt v. Maxim-Nordenfelt Co.*:¹ "In [the age of Queen Elizabeth, all restraints of trade, whatever they were, general or partial, were thought to be contrary to public policy, and therefore void.² In time, however, it was found that a rule so rigid and far-reaching must seriously interfere with transactions

¹ *Nordenfelt v. Maxim-Nordenfelt Co.*, App. Cas. (1894), 564 (63 L. J. Ch. 923). See also *Wright v. Rider*, 36 Cal. 342 (1868).

² Citing *Colgate v. Bacher*, 1 Croke, 872 (1602).

of every-day occurrence. Traders could hardly venture to let their shops out of their own hands; the purchaser of a business was at the mercy of the seller; every apprentice was a possible rival. So the rule was relaxed. It was relaxed as far as the exigencies of trade for the time being required, gradually and not without difficulty, until it came to be recognised that all partial restraints might be good, though it was thought that general restraints, that is, restraints of general application extending throughout the kingdom, must be bad."

There has never been a departure from the principle that contracts restraining a person from engaging in *any* business or occupation are absolutely void. In other directions, however, the early rule has been modified, and the courts have uniformly enforced contracts in partial restraint of trade, limited as to duration and the territory embraced, and have stated various arbitrary rules for determining what limitations of time and place are required by considerations of public policy.¹ While the American courts have not fol-

¹ The development of the law concerning contracts in restraint of trade, in their primary sense, is illustrated in the following list of early and recent cases, selected with reference to such contracts in restraint of trade as might naturally be incidental to the transfer of a business in the formation of a corporate combination:

United States: Navigation Co. v. Winsor, 20 Wall. 64 (1873); Fowle v. Parke, 131 U. S. 88 (1889), (9 Sup. Ct. Rep. 658); Chicago, etc. R. Co. v. Pullman Southern Car Co., 139 U. S. 79 (1891), (11 Sup. Ct. Rep. 490); United States v. Addyston Pipe, etc. Co., 85 Fed. 271 (1898), *affirmed* 175 U. S. 211 (1899), (20 Sup. Ct. Rep. 96).

California: Wright v. Rider, 36 Cal. 342 (1868); Callahan v. Donnolly, 45 Cal. 152 (1872).

Indiana: Beard v. Dennis, 6 Ind. 200 (1855); Eisel v. Hayes, 141 Ind. 41 (1895), (40 N. E. Rep. 119).

Maine: Whitney v. Slayton, 40 Me. 224 (1855).

Massachusetts: Pierce v. Fuller, 8 Mass. 223 (1811); Alger v. Thacher, 19 Pick. 51 (1837); Taylor v. Blanchard, 13 Allen, 370 (1866); Gamewell Fire Alarm Tel. Co. v. Crane, 160 Mass. 50 (1893), (35 N. E. Rep. 98); Anchor, etc. Mfg. Co. v. Hawkes, 171 Mass. 101 (1898), (50 N. E. Rep. 509).

Michigan: Hubbard v. Miller, 27 Mich. 15 (1873); Beal v. Chase, 31 Mich. 490 (1875).

New Jersey: Trenton Potteries Co. v. Olyphant, 58 N. J. Eq. 507 (1899), (43 Atl. Rep. 723).

New York: Lawrence v. Kidder, 10 Barb. 641 (1851); Diamond Match Co. v. Roeber, 106 N. Y. 473 (1887), (13 N. E. Rep. 419); Tode v. Gross, 127 N. Y. 480 (1891), (28 N. E. Rep. 469), Leslie v. Lorillard, 110 N. Y. 519 (1888), (18 N. E. Rep. 363).

Ohio: Lange v. Werk, 2 Ohio St. 519 (1853).

Wisconsin: Berlin Machine Works v. Perry, 71 Wis. 495 (1888), (38 N. W. Rep. 82).

lowed the most recent English decisions¹ in holding that a contract in restraint of trade may, under certain circumstances, be enforced, although unlimited both in regard to time and territory, there is a tendency both in England and America, in determining the validity of such a contract, to apply the reasonable test stated by Lord Chief Justice Tindall in *Horner v. Graves*:² "We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either, it can only be oppressive; and if oppressive, it is, in the eye of the law, unreasonable."

§ 336. **Modern Use of Phrase "Contract in Restraint of Trade."** — The phrase "contract in restraint of trade," in the absence of an acquired meaning, would have a broad application. "Competition is the life of trade," and any contract having for its object the restriction of competition might appropriately be described as a contract in restraint of trade. In this sense, the phrase is used in many modern statutes and judicial decisions.³

England: *Mitchel v. Reynolds*, 1 P. Wms. 181 (1711), (Smith's Leading Cases, 7 Eng. Ed. 407, 8 Am. Ed. 756); *Ward v. Byrne*, 5 M. & W. 548 (1839); *Whittaker v. Howe*, 3 Beav. 383 (1841); *Jones v. Lees*, 1 H. & N. 189 (1856); *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 345 (1869); *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351; *Nordenfelt v. Maxim-Nordenfelt Co.*, App. Cas. (1894) 535 (63 L. J. Ch. 908).

¹ *Nordenfeldt v. Maxim-Nordenfelt Co.*, App. Cas. (1894) 535 (63 L. J. Ch. 908); *Badische Anilin und Soda Fabrik v. Schott*, 61 L. J. Ch. 698 (1892); *Underwood v. Barker*, 1 Ch. 300 (1899), (68 L. J. Ch. 201).

² *Horner v. Graves*, 7 Bing. 743 (1831).

³ In *Addyston Pipe, etc. Co. v.*

United States, 175 U. S. 244 (1899), (20 Sup. Ct. Rep. 96), Mr. Justice Peckham said: "We have no doubt that where the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity at the enhanced price are continually being made."

In *Nester v. Continental Brewing Co.*, 161 Pa. St. 481 (1894), (29 Atl. Rep. 102), the Supreme Court of Pennsylvania said of an agreement among brewers to regulate the price of beer:

Such use of the phrase should be condemned. The phrase has acquired a well-defined meaning. As already shown, for three hundred years it has been applied to ancillary contracts to refrain from engaging in a particular business, and other contracts of that nature; and there is no apparent reason why confusion should be occasioned by its use, at the present time, to describe contracts of an essentially different nature, however appropriate, in the choice of words, such use may be. But the more serious objection to the modern use of the phrase is that it offers a false standard for determining the validity of industrial combinations. The validity of a combination for the suppression of competition depends upon considerations of public policy. Rules governing conventional contracts in restraint of trade have no application. And yet, an examination of reported cases will show that the courts, in determining the validity of such combinations, repeatedly refer to those rules, and, in some cases, that contracts manifestly against the rules of public policy have been declared lawful because limitations in regard to time and space were reasonable.¹

"The test question, in every case like the present, is whether or not a contract in restraint of trade exists which is injurious to the public interests. If injurious, it is void as against public policy."

American Biscuit, etc. Co. v. Klotz, 44 Fed. 725 (1891): "So far, therefore, as the complainant's business is a combination in restraint of trade, . . . the law stamps it as unlawful, and the courts should not encourage it."

John D. Park & Sons Co. v. Nat. Wholesale Druggists Ass'n, 50 N. Y. Supp. 1665 (1896): "It is in restraint of trade and unlawful for such manufacturer to become a party to a combination which shall prevent any of his customers from obtaining other goods of other manufacturers," etc.

India Bagging Ass'n v. Kock, 14 La. Ann. 164 (1849): "The agreement between the parties [not to sell cotton bagging except under certain condi-

tions] was palpably and unequivocally a combination in restraint of trade, and to enhance in the market an article of ordinary necessity to cotton planters."

Distilling, etc. Co. v. People, 156 Ill. 486 (1895), (41 N. E. Rep. 188): "No one . . . can . . . doubt that it was designed to be, and was in fact, a combination in restraint of trade, and that it was organized for the purpose of getting control of the manufacture and sale of all distillery products, so as to stifle competition." See also *State v. Nebraska Distilling Co.*, 29 Neb. 700 (1890), (46 N. W. Rep. 155).

The federal anti-trust statute (*post*, § 376) also uses the phrase "contract in restraint of trade" in the broad sense.

¹ "The utter inadequacy of the doctrine condemning contracts in restraint of trade, as a basis to which to refer, that against restrictions upon competition seems to us, to be made clear by

§ 337. **Direct Test of Validity of Combination not whether it is in Restraint of Trade.** — Even if the modern use of the phrase “contract in restraint of trade” were unobjectionable, it is unnecessary.

Contracts and combinations in restraint of trade are declared to be contrary to public policy and, therefore, invalid. But the test of the validity of a combination, as pointed out in reference to monopolies,¹ is whether the particular acts and agreements of the parties in forming it are of such a nature, and for such a purpose, as to be against public policy. If so, the combination is invalid; and, if not against public policy, it is immaterial whether it is in restraint of trade.

The syllogism: All contracts in restraint of trade are against public policy; this combination is a contract in restraint of trade; therefore, it is against public policy, formulates the reasoning in many decisions. This reasoning, while logical, is circuitous. The essential question is whether the combination, itself, is opposed to public policy. The determination of this question is not promoted by the intervention of another standard.

illustration. At least until very recently, the doctrine against contracts in restraint of trade would have been so applied as to hold illegal the withdrawal (without limit as to time or space) of one out of a thousand trade competitors in a given city, notwithstanding that the continuance of the other nine hundred and ninety-nine would have effectually prevented the danger of a monopoly. On the other hand, the same doctrine would (as modified as to space) have been ordinarily so applied as to hold legal the

withdrawal, by agreement, of the nine hundred and ninety-nine, though such withdrawal would seem to be ordinarily within the condemnation of the present doctrine against restriction upon competition.” Article in 33 Am. Law Rev. 68, entitled “Anti-Trust Legislation and the Doctrine against Contracts in Restraint of Trade.” See also note to *Harding v. American Glucose Co.*, 74 Am. St. Rep. 235.

¹ *Ante*, § 333: “*Direct Test of Validity of Combination not whether it is a Monopoly.*”

CHAPTER XXXIV.

FORMULATION OF RULES OF PUBLIC POLICY.

- § 338. Definition and Nature of Public Policy.
- § 339. Necessity for Rules of Public Policy.
- § 340. Difficulty of formulating Rules of Public Policy concerning Combinations.
- § 341. Formulation of Rules. Basis in Judicial Decisions.
- § 342. Basis of Rules — (A) Case of the Sugar Trust.
- § 343. Basis of Rules — (B) Case of the Standard Oil Trust.
- § 344. Basis of Rules — (C) Whiskey Trust Cases.
- § 345. Basis of Rules — (D) Case of the Preservers Trust.
- § 346. Basis of Rules — (E) Case of the Chicago Gas Trust.
- § 347. Basis of Rules — (F) Case of the Diamond Match Company.
- § 348. Basis of Rules — (G) Case of the Glucose Combination.
- § 349. Basis of Rules — (H) Miscellaneous Cases.

§ 338. **Definition and Nature of Public Policy.** — “Public policy,” said Lord Brougham, “is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good.”¹ A more precise definition cannot well be stated. Although the fundamental principles are unchangeable,² public policy, in its very nature, is uncertain and fluctuating.³

¹ *Egerton v. Brownlow*, 4 H. L. Cas. 196 (1853). See also *People v. Chicago Gas Trust Co.*, 130 Ill. 268 (1889), (22 N. E. Rep. 798, 17 Am. St. Rep. 319).

² *Brooks v. Cooper*, 50 N. J. Eq. 769 (1893), (26 Atl. Rep. 981), *per* Lippincott, J.: “It has been declared that public policy is a variable quality, but the principles to be applied have always remained unchanged and unchangeable, and public policy is only variable in so far as the habits, capacities and opportunities of the public have become more varied and complex. The relations of society become from time to time more complex; statutes defining and declaring public and private rights multiply rapidly, and public policy often changes as the laws change, and therefore new applications of old prin-

ciples are required. Whatever tends to injustice and oppression, restraint of liberty, restraint of legal right; whatever tends to the obstruction of justice, a violation of a statute, or the obstruction or perversion of the administration of the law; whatever tends to interfere with or control the administration of the law, as to executive, legislative or other official action, whenever embodied in and made the subject of a contract, the contract is against public policy, and therefore void, and not susceptible of enforcement. All contracts prejudicial to the interests of the public, such as contracts tending to prevent competition, whenever the statute or any known rule of law requires it, are void.”

³ In *Richardson v. Mellish*, 2 Bing. 252 (1824), Mr. Justice Burrough said: “I, for one, protest, as my Lord has

It varies with the times.¹ The growth of trade and commerce has made acts and contracts which formerly were in conflict with public policy, recognized and approved methods of doing business. It is as impossible to give an exact definition of the phrase as it is to define fraud. The rule stated by Judge Story,² however, may safely be applied: "*Whenever any contract conflicts with the morals of the time, and contravenes an established interest of society, it is void, as being against public policy.*"

The public policy of a State is manifested, primarily, by its statutes and, secondarily, by its judicial decisions.³ Questions of public policy, however, generally arise in connection with contracts which are neither *mala prohibita* nor *mala in se*. The former are expressly prohibited and the latter are manifestly unlawful. In testing the validity of this middle class of contracts by the standard of public

done, against arguing too strongly upon public policy; it is a very unruly horse, and when once you get astride it you never know where it will carry you."

¹ In *Koehler v. Feurbach*, 2 Mo. App. 14 (1876), the Court said: "What constitutes public policy is not, perhaps, exactly determinable; it is indefinite in its nature, changing with the habits, wants, and opinions of society. Fore-stalling, regrating, and engrossing were prohibited by statute in England three hundred years ago, and were considered to be against public policy so late as the time of Blackstone. They are now the great basis of profits; are not only practiced every day, but are recognized as the very life of trade, and without them it may be said that commerce, as known amongst us, would be at an end. . . . Contracts in total restraint of trade, or of marriage, against the prohibitions of statutes, to infringe a copyright, to defraud the government or third parties, to oppress third parties or prevent the due course of justice, or induce a violation of public duty, that tend to encourage unlawful or immoral acts, or that are founded on trading

with an enemy, are all against public policy, and void. And, probably, this is a complete enumeration of the several classes to which contracts against public policy may be reduced."

² 1 Story on Contracts, 649.

³ *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 340 (1897), (17 Sup. Ct. Rep. 559): "The public policy of the government is to be found in its statutes, and when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials; but when the law-making power speaks upon a particular subject, over which it has constitutional power to legislate, public policy in such a case is what the statute enacts. If the law prohibit any contract or combination in restraint of trade or commerce, a contract or combination made in violation of such law is void, whatever may have been theretofore decided by the courts to have been the public policy of the country on that subject."

See also *Harding v. American Glucose Co.*, 182 Ill. 551 (1899), (55 N. E. Rep. 577, 74 Am. St. Rep. 235.)

policy, the right of the individual to contract—a fundamental right—is liable to be impaired, and such contracts should be set aside only when clearly inimical to established interests of society.¹

§ 339. **Necessity for Rules of Public Policy.**—As already shown, the application of the law of monopolies and of contracts in restraint of trade in determining the validity of a particular combination, only leads to the result that if it is against public policy, it is illegal.

The same consequence follows the application of other tests which have been stated by the courts and text writers. Thus, it has been said that the test of the illegality of a combination is the injury to the public. It is undoubtedly true that the law condemns only those combinations which are injurious to the public, but, as an effective test of the validity of a combination, the statement is valueless. In applying it, the only result obtainable is that if a particular combination injures the public it is illegal; but the essential question, whether it is injurious, can only be determined by the application of a rule of public policy. So, in a more definite form, it is stated that a combination of competing producers is illegal which has for its object the maintenance of prices and restriction of production. But agreements to maintain prices and limit production are only means of restraining competition, and power to control prices and restrict production is only an incident of the suppression of competition. To what extent combinations in restraint of competition are invalid depends upon the application of a rule of public policy.

The formulation of rules of public policy is, therefore,

¹ Kellogg v. Larkin, 3 Pin. (Wis.) 136 (1851), (56 Am. Dec. 164): "I by no means intend to deny the right or propriety of judicially determining that a contract that is actually at war with any established interest of society is void, however individuals may suffer thereby, because the interest of individuals must be subservient to the public welfare. But I insist that before a

court should determine a contract which has been made in good faith, stipulating for nothing that is *malum in se*, nothing that is made *malum prohibitum*, to be void as contravening the policy of the State, it should be satisfied that the advantage to accrue to the public from so holding is certain and substantial, not theoretical or problematical."

necessary in order to obtain definite standards for determining the legality or illegality of any combination.

§ 340. **Difficulty of Formulating Rules of Public Policy concerning Combinations.** — When public policy is manifested by statute, the statute is itself the rule;¹ when it is manifested by judicial decisions, based upon a uniform course of reasoning, the formulation of a rule of public policy requires only the classification of governing principles. But whatever rules of public policy may exist for determining the validity of a combination of corporations have been evolved coincidentally with the development of the combination itself, and the process of evolution has been circuitous. The courses of reasoning by which different courts have arrived at the same conclusion have varied widely; and, upon the same state of facts, different conclusions have been reached.

The formulation of rules from conflicting decisions upon a subject uncertain in its nature is, obviously, attended with difficulties.

§ 341. **Formulation of Rules. Basis in Judicial Decisions.** — While the framing of rules of public policy concerning combinations is difficult, both by reason of the subject and conflicting decisions, certain broad principles may be gathered from the current of authority. Combinations of a certain nature are clearly against public policy and void. Other combinations are clearly valid. Concerning still others, there is an irreconcilable diversity of judicial opinion.

In ascertaining these principles, an extended examination of the decisions of the courts is necessary. Judicial decisions form the basis of any rule of public policy not established by statute, and leading cases must be carefully examined to ascertain their underlying principles. In presenting the result of such an examination in a treatise, general propositions may be misleading. The law, in cases of combinations, is closely interwoven with the facts. An exact appreciation

¹ When a combination is authorized policy. *Stewart v. Erie, etc. Transp. Co.*, 17 Minn. 372 (1871).
or prohibited by statute, that fact is
conclusive upon the question of public

of the principles of public policy enunciated can only be obtained by examining the reasons and reasoning of the court, in connection with the facts of the case. It, therefore, seems advisable to state the conclusions of the courts — extracts from the opinions — in the leading cases upon combinations of corporations, together with facts sufficient to indicate the scope of the decisions — as indicating the *basis* of rules of public policy.

§ 342. **Basis of Rules — (A) Case of the Sugar Trust.** — The two leading cases upon the validity of combinations are, undoubtedly, the cases of the Sugar and Standard Oil Trusts.

In the *Sugar Trust Case*,¹ the trial court, Judge Barrett,

¹ *People v. North River Sugar Ref'g Co.*, 121 N. Y. 582 (1890), (24 N. E. Rep. 834, 18 Am. St. Rep. 843), s. c. 54 Hun, 354 (1889), (3 N. Y. Supp. 401). (The latter report includes both the general and special term decisions.)

The Sugar Trust was a combination of sugar refineries, formed in 1887, under the name of the Sugar Refineries Company. Individuals and firms took the form of corporations before entering the combination. All the stock of the several corporations was transferred to a board of eleven trustees, who issued in lieu thereof "trust certificates" for corresponding proportionate amounts. The object of the "trust," as stated in the agreement, was as follows:

"(1) To promote economy of administration and reduce the cost of refining, thus enabling the price of sugar to be kept as low as is consistent with reasonable profit.

"(2) To give to each refinery the benefit of all appliances, known or used by the others, and useful to improve the quality and diminish the cost of refined sugar.

"(3) To furnish protection against unlawful combinations of labor.

"(4) To protect against inducements to lower the standard of refined sugars.

"(5) Generally to promote the interests of the parties hereto in all lawful and suitable ways."

The trustees received the profits from all the plants and distributed them as dividends upon the "trust certificates." Directors of the several corporations were chosen, but had no power. *Quo warranto* proceedings were instituted by the attorney-general of New York against the North River Sugar Refining Company, a constituent corporation, upon the ground that it was a party to an unlawful combination, and, also, had exceeded its chartered powers. The case was first heard before Judge Barrett, at special term, who held that the combination was a monopoly, and that the defendant corporation had forfeited its charter by *ultra vires* acts injurious to the public. Upon appeal to the general term, the former decision was sustained upon similar grounds. The Court of Appeals, however, while affirming the judgment, placed its decision solely upon the ground that the corporation had forfeited its charter by entering into an unlawful partnership of corporations, and by attempting to practically consolidate with other corporations without following the consolidation statute.

The decision in this case was, however, without practical effect. The trust was reorganized under the laws of New Jersey in the form of a corporate combination, and has done business ever since.

For other cases relating to the Sugar

said: "Any combination, the tendency of which is to prevent competition in its broad and general sense, and to control, and thus at will enhance, prices to the detriment of the public, is a legal monopoly. And this rule is applicable to every monopoly, whether the supply be restricted by nature or susceptible of indefinite production. The difficulty of effecting the unlawful purpose may be greater in one case than in the other, but it is never impossible. Nor need it be permanent or complete. It is enough that it may be even temporarily and partially successful."

Upon appeal, the general term, Judge Daniels, said: "In this case it was a leading object to combine together the different corporations and individuals engaged in this business, not only in and about the City of New York, but throughout the country, and to secure that control by a substantial organization for an indefinite period of time. This was not to be done, and was not, in fact, done for an idle purpose, or merely to furnish the means of protection against unlawful combinations or for any other mere economical object, but it was, manifestly, to place this business within the control, and subject to the dictation, of this association, and of the board selected for the government of its affairs. And, after putting forth the efforts necessary to secure the end, it would not only be idle, but absurd, to indulge in the supposition that it was not intended to wield the authority, in this manner secured, for the pecuniary advantage of the associates. And the direct and usual way in which that is accomplished, following out the common impulses of practical business men, is by the advancement of the prices of the commodities manufactured and sold, in the course of the business whose control may be in this way secured. When the opportunity to do that is provided, human selfishness is sure to turn it to a profitable account. A jury certainly would be fully justified in concluding, from the agreement and the other

Trust, see *People v. American Sugar Ref'g Co.*, 57 Hun. (N. Y.), 592 (1890), 7 Ry. & Corp. L. J. 83 (10 N. Y. Supp 632); *United States v. Cameron v. Havemeyer*, 25 E. C. Knight Co., 156 U. S. 1 (1895), Abb. N. C. 438 (1890), (12 N. Y. Supp. 126); *Gray v. De Castro, etc. Sugar*

facts in evidence in the case, that the governing object of the association was to promote its interests and advance the prosperity of the associates, by limiting the supply, when that could properly be done, and advancing the prices of the products produced by the companies. To conclude otherwise would be to violate all the observations and experiences of practical life. This is a controlling feature in this controversy. And that it was intended to be secured by the organization provided for, and which actually took place, is reasonably free from doubt. And where that appears to be the fact, the agreement, association, combination or arrangement, or whatever else it may be called, having for its objects the removal of competition and the advancement of prices of necessities of life, is subject to the condemnation of the law, by which it is denounced as a criminal enterprise."

The Court of Appeals, however, finally decided the case upon grounds peculiar to corporation law, saying: "We have reached our conclusion, and it appears to us to have been established that the defendant corporation has violated its charter and failed in the performance of its corporate duties, and that in respects so material and important as to justify a judgment of dissolution. Having reached that result, it becomes needless to advance into the wider discussion over monopolies and competition and restraint of trade and the problems of political economy. Our duty is to leave them until some proper emergency compels their consideration."

§ 343. *Basis of Rules* — (B) *Case of the Standard Oil Trust*. — In the *Case of the Standard Oil Trust*¹ the Supreme Court of Ohio, by Judge Minshall, said:

¹ *State v. Standard Oil Co.*, 49 Ohio St. 137 (1892), (30 N. E. Rep. 379, 34 Am. St. Rep. 541, 15 L. R. A. 145, 36 Am. & Eng. Corp. Cas. 1).

The celebrated Standard Oil Trust, a combination of corporations engaged in the production and sale of petroleum and its products, was formed in 1882 by

a trust agreement, substantially in the following form:

(1) "As soon as practicable, a corporation shall be formed in each of the following States under the laws thereof, to wit: Ohio, New York, Pennsylvania and New Jersey. . . ."

(2) "The purpose and powers of

"By this agreement, indirectly it is true, but none the less effectually, the defendant is controlled and managed by

said corporation shall be to mine for, produce, manufacture, refine, and deal in petroleum and all its products, and all the materials used in such businesses, and transact other business collateral thereto. . . ."

(3) "At any time hereafter, . . . similar corporations may be formed in other States and Territories."

(4) "Each of said corporations shall be known as the Standard Oil Co. of [name of State]."

(5) "The capital stock of each of said corporations shall be fixed at such an amount as may seem necessary. . . ."

(6) "The shares of stock of each corporation shall be issued only for money, property, or assets, equal at a fair valuation to the par value of the stock delivered therefor."

(7) "All of the property, real and personal, assets and business of each and all of the corporations . . . mentioned in class first . . . in or of each particular State, shall be transferred to and vested in the Standard Oil Company of that particular State. . . ."

(8) "The individuals embraced in class second . . . agree . . . to sell, assign, transfer, convey and set over all the property, real and personal, assets and business mentioned and embraced in schedules accompanying such sale and transfer to the Standard Oil Company, or Companies, of the proper State or States. . . ."

(9) "The parties embraced in class third . . . agree to assign and transfer all the stock held by them in the corporations . . . herein named to the trustees herein provided for. . . . And whenever and as often as all the stocks of any corporation . . . are vested in said trustees, the proper steps may then be taken to have all the money, property, real and personal, of such corporation . . . conveyed to the Standard Oil Company of the proper State, . . . in which event the trustees shall receive stocks of the Standard Oil Companies equal to

the value of the money, property, and business assigned. . . ."

(10) "The consideration for the transfer . . . to each or any of the Standard Oil Companies, shall be the stock of the respective . . . company to which such transfer or conveyance is made. . . . Said stock shall be delivered to the trustees. . . ."

(11) "The consideration for any stocks delivered to said trustees . . . shall be the delivery . . . to the persons entitled thereto of trust certificates . . . equal at par value to the par value of the stock of the said Standard Oil Companies so received by said trustees."

This agreement was signed by all the officers and stockholders of the Standard Oil Co. of Ohio, — the defendant in the case, — but its corporate name and seal were not affixed.

Quo warranto proceedings were instituted by the attorney-general of Ohio upon the ground that the defendant corporation had misused its franchises by becoming a party to an agreement opposed to public policy.

The Supreme Court of Ohio held upon demurrer to the defendant's answer:

1. That the defendant company entered into the agreement in its corporate capacity.

2. That the agreement subjected the defendant to a control inconsistent with its character as a corporation.

3. That it provided for an association contrary to public policy.

Judgment of absolute ouster was denied on account of the statute of limitations, but it was decreed that the defendant be ousted "from the power to make and perform" said agreement.

This judgment was rendered in 1892, and at the time of writing (1902), the same Standard Oil Trust is carrying on a business of far-reaching and ever-increasing magnitude.

For consideration of rights of holders of Standard Oil "trust certificates," see

the Standard Oil Trust, an association with its principal place of business in New York City, and organized for a purpose contrary to the policy of our laws. Its object was to establish a virtual monopoly of the business of producing petroleum, and of manufacturing, refining and dealing in it and all its products, throughout the entire country, and by which it might not merely control the production, but the price, at its pleasure. All such associations are contrary to the policy of our State and void. . . . Much has been said in favor of the objects of the Standard Oil Trust, and what it has accomplished. It may be true that it has improved the quality and cheapened the cost of petroleum and its products to the consumer. But such is not one of the usual or the general results of a monopoly; and it is the policy of the law to regard, not what may, but what usually happens. Experience shows that it is not wise to trust human cupidity when it has the opportunity to aggrandize itself at the expense of others. . . .

“A society in which a few men are the employers, and the great body are merely the employees or servants, is not the most desirable in a republic; and it should be as much the policy of the laws to multiply the numbers engaged in independent pursuits or in the profits of production, as to cheapen the price to the consumer. Such policy would tend to an equality of fortunes among its citizens, thought to be so desirable in a republic, and lessen the amount of pauperism and crime.”

§ 344. **Basis of Rules — (C) Whiskey Trust Cases.** — In the *Case of the Distillers and Cattle Feeders Trust*¹ (“Whiskey

Rice v. Rockefeller, 134 N. Y. 174 (1892), (31 N. E. Rep. 907.)

¹ *State v. Nebraska Distilling Co.*, 29 Neb. 700 (1890), (46 N. W. Rep. 155). The Distillers and Cattle Feeders Trust, an unincorporated association, was formed in 1887 by the owners of nine distilleries located north and west of the Ohio River, for the purpose of restricting the output, regulating prices, and suppressing competition in the manufacture and sale of alcohol, high

wines, and other liquors. The object of the trust was accomplished by its getting control of as many distilleries as possible, and the method adopted is stated in the report as follows: “An arrangement or agreement is made by which the company is to transfer its capital stock to the trustees of the Distillers and Cattle Feeders Trust, for which said trustees are to issue certificates of the trust. The real estate upon which the distillery plant is situated is

Trust”), the Supreme Court of Nebraska said: “The findings in this case, to which no objection is made, clearly show that the object of the Distilling Company in entering into the illegal combination was to destroy competition and create a monopoly, not only by limiting the production of alcohol; but, by dismantling as many distilleries as the trust saw fit, absolutely prevent the manufacture of the article except in the few establishments controlled by the trust, and thus it would be enabled to control prices, prevent production, and create a monopoly of the most offensive character.”

deeded to some one member of the company as trustee for the stockholders, and the trustee then leases said real estate to the company for the term of twenty-five years. The capital stock of the company is cancelled and new stock issued to said nine trustees of the trust, for which the trustees give the agreed amount of certificates of the trust. The board of directors of the company resigns and a new board is elected, a majority of which are taken from the nine trustees of the trust. . . . The trustees of the trust have almost unlimited power and control over all distilleries that enter it. They can limit their production or suspend their operation altogether. . . . The trustees confine the production of the distilleries under their control to the large houses situated in favorable localities, which can be run at less expense than small houses located in unfavorable places. . . . The said trustees can, and do, at will restrict and limit the production and supply of alcohol, spirits, and other liquors, and thereby enhance their value.”

The Nebraska Distilling Company became a party to the trust in the manner described. *Quo warranto* proceedings were instituted against that corporation, and, upon the facts stated, the Supreme Court of Nebraska held that the trust agreement was contrary to public policy and void, and that the defendant corporation had forfeited its charter.

The Distillers and Cattle Feeders

Trust being thus attacked, a corporation, called the Distilling and Cattle Feeding Company, was formed, in 1890, for the purpose of taking over the assets of the trust and it issued its certificates of stock in lieu of the old trust certificates.

Quo warranto proceedings against the new corporation were instituted by the attorney-general of Illinois upon the ground that it was a mere continuation, in corporate form, of an illegal trust, and the Supreme Court of Illinois, in *Distilling and Cattle Feeding Co. v. People*, 156 Ill. 448 (1895), (41 N. E. Rep. 188), held that the conveyance from the trust to the corporation was merely a form; that (p. 491) “the trust, . . . being repugnant to public policy and illegal, it is impossible to see why the same is not true of the corporation which succeeds to it and takes its place.”

Judgment of ouster was thereupon pronounced against the company.

Prior to final decree, however, a receiver of the corporation had been appointed by the United States Circuit Court (*Olmstead v. Distilling and Cattle Feeding Co.*, 73 Fed. 44 (1895)), and the property of the corporation was subsequently sold, and, through a re-organization plan, another corporation, The American Spirits Manufacturing Company, organized under the laws of New Jersey, acquired the assets and business. Various re-organizations have taken place since that time.

In a later case against the Distilling and Cattle Feeding Company,¹ successor to the Distillers and Cattle Feeders Trust, the Supreme Court of Illinois said, concerning the latter combination: "There can be no doubt, we think, that the Distillers and Cattle Feeders Trust, which preceded the incorporation of the defendant, was an organization which contravened well-established principles of public policy, and that it was, therefore, illegal. No one who intelligently considers the scheme of this trust, as detailed in the information, can for a moment doubt that it was designed to be, and was, in fact, a combination in restraint of trade, and that it was organized for the purpose of getting control of the manufacture and sale of all distillery products, so as to stifle competition, and to be able to dictate the amount to be manufactured and the prices at which the same should be sold, and thus to create, or tend to create, a virtual monopoly of the manufacture and sale of products of that character."

§ 345. **Basis of Rules — (D) Case of the Preservers Trust.** — In *Bishop v. American Preservers Co.*² the Supreme Court of

¹ *Distilling and Cattle Feeding Co. v. People*, 156 Ill. 486 (1895), (41 N. E. Rep. 188).

² *Bishop v. American Preservers Co.*, 157 Ill. 311 (1895), (41 N. E. Rep. 765, 48 Am. St. Rep. 317), *per* McGruder, J.

The American Preservers Trust was a voluntary association formed, originally, by the stockholders of seven corporations located in different States, and engaged in the business of preserving fruit. The trust agreement provided for the creation of a board of nine trustees, to whom the parties agreed to transfer their stock in exchange for trust certificates. The trustees were to hold in trust the stocks transferred to them, receive the dividends thereon, and distribute the same in the form of dividends upon the certificates. The trustees were also authorized to purchase the stock, or the plants and property, of other corporations by the issue of trust certificates. They were also empow-

ered to organize other corporations, to carry on the business of the trust and to acquire and hold the stock of such corporations. The trust was to continue twenty-five years, unless sooner, terminated by the act of a certain number, in excess of a majority, of the certificate holders.

In accordance with the provisions of the trust agreement, the trustees formed a corporation called the American Preservers Company. This company instituted an action of replevin against one Bishop to recover possession of certain property which he had agreed to transfer to the corporation, and of which he had given a bill of sale and for which trust certificates had been issued to him. Bishop had previously tendered his certificates back, retained possession of the property, and defended the suit upon the ground that the corporation was merely an instrument of an unlawful trust and without standing in court to enforce the agreement. The Supreme Court of Illinois held

Illinois said: "The agreement recites that it is designed by its signers to form a trust for the purpose of securing co-operation in the business of manufacturing preserves, etc., and of selling and dealing in the same in home and foreign markets. This co-operation, to be secured through the extraordinary powers conferred upon the nine trustees named in the agreement, six of whom are designated by name and authorized to elect three others, could not result otherwise than in a grinding monopoly, controlling all trade in the business specified, and raising or depressing prices therein at the will of the trustees. . . . It will thus be seen that the agreement in question makes provision for welding together all the interests engaged in the business named in the agreement, into one giant combination or partnership under the absolute dominion and control of a board of nine trustees. Its illegal purpose is apparent upon its face, and, therefore, under the decisions above referred to, it must be held to be void, as being injurious to the public interest."

§ 346. **Basis of Rules — (E) Case of the Chicago Gas Trust.** — In *People v. Chicago Gas Trust Co.*¹ the Supreme Court of Illinois said:

that the trust agreement was an illegal contract and refused to grant relief, saying (p. 316): "The law will not aid the appellee to recover the property, but will leave both it and the appellant where they were when the suit was begun."

In *American Preservers Trust v. Taylor Mfg. Co.*, 46 Fed. 152 (1891), this trust was also held to be invalid upon principles of corporation law. Judge Thayer said: "The question now before the court is, whether a business corporation, organized under the laws of this State, has the right to become a member of such an association with such extensive power, and that inquiry must be answered in the negative."

¹ *People v. Chicago Gas Trust Co.*, 130 Ill. 294 (1889), (22 N. E. Rep. 798, 17 Am. St. Rep. 319). The Chicago Gas Trust Company was organized in 1887, under the general incorporation

act of Illinois, for two purposes, as stated in its articles of incorporation: *First*, to erect and operate gas works for the manufacture and sale of gas in the City of Chicago, and other places in Illinois. *Second*, to purchase, hold and sell the capital stock, or purchase or lease the property, plants, goodwill, rights and franchises of other gas companies in Chicago or elsewhere in Illinois.

The corporation did not erect or operate any gas works, but sought to exercise the power claimed under the second clause and acquired a majority of the capital stock of four independent gas companies then doing business in Chicago, thereby controlling them.

Quo warranto proceedings against the Trust Company were instituted by the attorney-general of Illinois upon the ground that it had usurped and exercised "powers, liberties, privi-

“Public policy is that principle of the law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good. This principle owes its existence to the very sources from which the common law is supplied.¹ The common law will not permit individuals to oblige themselves by a contract either to do or not to do anything when the thing to be done or omitted is in any degree clearly injurious to the public. . . . ‘Contracts creating monopolies are null and void as being contrary to public policy.’² All grants creating monopolies are made void by the common law.³ In the *Case of the Monopolies*⁴ it was decided as long ago as the forty-fourth year of the reign of Queen Elizabeth, that a ‘grant to the plaintiff of the sole making of cards within the realm was utterly void, and that for two reasons: 1. That it is a monopoly and against the common law. 2. That it is against divers acts of parliament.’ . . . Of what avail is it that any number of gas companies may be formed under the general incorporation law, if a giant trust company can be chartered with the power of buying up and holding the stock and property of such companies, and, through the control thereby attained, can direct all their operations and weld them into one huge combination? The several privileges or franchises intended to be exercised by a number of companies are thus vested exclusively in a single corporation. To create one corporation for the express purpose of enabling it to control all the corporations engaged in a certain kind of

leges and franchises not conferred by law.” The defendant pleaded that it acted within the powers conferred by its charter.

A demurrer to the plea was overruled by the lower court, but sustained by the Supreme Court of Illinois upon the following grounds: (1) That the corporation had no express power to hold the stock of other corporations. (2) That it did not acquire such power by claiming it in its articles of association; (3) That it had no such incidental power; (4) That its exercise

of such power was unlawful; (5) That the stock of the four companies was acquired by the Trust Company with the design of bringing them “under its control, and by crushing out competition to monopolize the gas business of Chicago.”

¹ Citing Greenhood on Public Policy, pp. 2, 3.

² Citing 2 Addison on Contracts, 743.

³ Citing 7 Bacon’s Abridgment, 22.

⁴ Citing Case of the Monopolies, Part 11, Coke, 86 b (1602).

business, and particularly a business of a public character, is not only opposed to the public policy of the State, but is in contravention of the spirit, if not the letter, of the constitution. That the exercise of the power attempted to be conferred upon the appellee company must result in the creation of a monopoly, results from the very nature of the power itself."

§ 347. **Basis of Rules**—(F) **Case of the Diamond Match Company.**—In *Richardson v. Buhl* ("Diamond Match Company Case"),¹ the Supreme Court of Michigan (*per* Judge Sherwood) said: "The organization is a manufacturing company. The business in which it is engaged is making friction matches. Its articles provide for the aggregation of an enor-

¹ *Richardson v. Buhl*, 77 Mich. 657 (1889), (43 N. W. Rep. 1102).

The following facts were stated in the opinions: "It appeared from the testimony that the Diamond Match Company was organized for the purpose of controlling the manufacture and trade in matches in the United States and Canada. The object was to get all the manufacturers of matches in the United States to enter into a combination and agreement, by which the manufacture and output of all the match factories should be controlled by the Diamond Match Company. Those manufacturers who would not enter into the scheme were to be bought out, those who proposed to enter into the business were to be bought off, and a strict watch was to be exercised to discover any person who proposed to engage in such business, that he might be prevented, if possible. All who entered into the combination, and all who were bought off, were required to enter into bonds to the Diamond Match Company that they would not, directly or indirectly, engage in the manufacture or sale of friction matches, nor aid nor assist, nor encourage any one else in said business, where, by doing so, it might conflict with the business interests, or diminish the sales, or lessen the profits, of the Diamond Match Company.

These restrictions varied in individual cases, as to the time it was to continue, from ten to twenty years. Thirty-one manufacturers, being, substantially, all the factories where matches were made in the United States, either went into the combination or were purchased by the Diamond Match Company, and out of this number all were closed except thirteen."

An action involving the construction of a contract entered into in connection with the formation of the combination came before the Supreme Court of Michigan. No questions as to the validity of the contract or combination upon grounds of public policy, or otherwise, were raised by the parties; but the Court, of its own volition, held both the combination and the contract unlawful and refused to grant relief, saying: "A court of equity will leave the parties . . . where it finds them, outside the rules of courts of justice, '*in pari delicto*,' and they must settle their own grievances and unlawful transactions."

Compare, however, *Diamond Match Co. v. Roeber*, 106 N. Y. 473 (1887), (13 N. E. Rep. 419), where the New York Court of Appeals enforced one of the bonds above referred to without raising any question as to the validity of the combination.

mous amount of capital, sufficient to buy up and absorb all of that kind of business done in the United States and Canada, to prevent any other person or corporation from engaging in or carrying on the same, thereby preventing all competition in the sale of the article manufactured. This is the mode of conducting the business and the manner of carrying it on. The sole object of the corporation is to make money, by having it in its power to raise the price of the article, or diminish the quantity to be made and used, at its pleasure. Thus, both the supply of the article and the price thereof are made to depend upon the action of a half-dozen individuals, more or less, to satisfy their cupidity and avarice, who may happen to have the controlling interest in this corporation, an artificial person, governed by a single motive or purpose, which is to accumulate money regardless of the wants or necessities of over sixty million of people. The article thus completely under their control, for the last fifty years has come to be regarded as one of necessity, not only in every household in the land, but one of daily use by almost every individual in the country. It is difficult to conceive of a monopoly which can affect a greater number of people, or one more extensive in its effect on the country, than that of the Diamond Match Company. It was to aid that company in its purposes, in carrying out its object, that the contract in this case was made between these parties, and which we are now asked to aid in enforcing. Monopoly in trade or in any kind of business in this country is odious to our form of government. It is sometimes permitted to aid the government in carrying on a great public enterprise, or public work under government control, in the interest of the public. Its tendency is, however, destructive of free institutions, and repugnant to the instincts of a free people, and contrary to the whole scope and spirit of the federal Constitution, and is not allowed to exist under express provision in several of our State constitutions. Indeed, it is doubtful if free government can long exist in a country where such enormous amounts of money are allowed to be accumulated in the vaults of corporations, to be used at discretion in controlling

the property and business of the country against the interest of the public and that of the people, for the personal gain and aggrandizement of a few individuals. It is always destructive of individual rights, and of that free competition which is the life of business, and it revives and perpetuates one of the great evils which it was the object of the framers of our form of government to eradicate and prevent. It is alike destructive to both individual enterprise and individual prosperity, whether conferred upon corporations or individuals, and therefore public policy is, and ought to be, as well as public sentiment, against it. All combinations among persons or corporations for the purpose of raising or controlling the prices of merchandise, or any of the necessities of life, are monopolies, and intolerable; and ought to receive the condemnation of all courts."

Judge Champlin said, in concurring: "Such a vast combination as has been entered into under the above name is a menace to the public. Its object and direct tendency is to prevent free and fair competition, and control prices throughout the national domain. It is no answer to say that this monopoly has, in fact, reduced the price of friction matches. That policy may have been necessary to crush competition. The fact exists that it rests in the discretion of this company at any time to raise the price to an exorbitant degree. Such combinations have frequently been condemned by the courts as unlawful and against public policy."

§ 348. **Basis of Rules — (G) Case of the Glucose Combination.** — In the recent case of *Harding v. American Glucose Company*,¹ the Supreme Court of Illinois reaffirmed its earlier

¹ *Harding v. American Glucose Co.*, 182 Ill. 615 (1899), (55 N. E. Rep. 577). The following is a brief summary of the facts in this important case: Prior to 1897, seven competing corporations alone were engaged in the manufacture of glucose — a corn product — in the corn belt of the United States, which is the only territory in which it can be successfully manufactured. In that year, a scheme was entered into for the purpose of combining the properties of

these corporations in a single corporation, and all of said companies, except one — the smallest — became parties to such arrangement. Accordingly, the Glucose Sugar Refining Company was organized under the laws of New Jersey for the purpose of acquiring the plants of the several companies. Option contracts were signed by each company wherein it agreed to sell all its real and personal property, good-will, trade-marks, etc., to a trust company or its

decisions that trusts and combinations, for the prevention of competition, are against public policy: "Any combination of competing corporations for the purpose of controlling prices, or limiting production, or suppressing competition, is contrary to public policy, and is void. . . . In the present case each of six corporations, engaged in the manufacture of glucose, made a contract to sell its plant to a new corporation to be organized, and agreed not to engage in such manufacture for a term of years, and then conveyed all its property to the new corporation organized to conduct the same kind of business; and it did all this with the knowledge and understanding that each of five other competing corporations was making the same kind of contract, and executing the same kind of conveyance in respect to their own respective properties, all to be consummated and delivered at the same time, and under the direction and management of agents or promoters employed by all the corporations. If the transactions referred to in the bill in this case did not amount to an absolute agreement made in advance between the six corporations, they at least constituted a scheme understood by all the corporations, and participated in by them all. The carrying out of the scheme, thus understood and participated in, would necessarily result in the suppression of competition in the manufacture of glucose, and in the creation of a monopoly in that business. . . . The material consideration in the case of such combinations is, as a gen-

transferee, if requested within a reasonable time. These contracts provided that payment for the properties transferred should be in stock of the new company, or, sometimes, partly in cash and partly in stock. The options were exercised, and the plants and other property of the companies were transferred or about to be transferred to the new corporation.

Thereupon a stockholder of one of said companies — the American Glucose Company, a New Jersey corporation — who objected to the transfer, filed a bill for an injunction to restrain the transfer of the property of his corporation

to the combination upon the ground that the whole arrangement was for the purpose of controlling prices, suppressing competition, and creating a monopoly.

The Supreme Court of Illinois, for the reasons stated in the text, and others, sustained the claim of the complainant, and granted the relief prayed for.

The case is also of importance in determining the rights and *status* of corporations and their stockholders — parties to unlawful combinations — in foreign States, with reference to property there situated.

eral thing, not that prices are raised, but that it rests in the power and discretion of the trust or corporation, taking all the plants of the several corporations, to raise prices at any time, if it sees fit to do so. It does not relieve the trust of its objectionable features that it may reduce the price of the articles which it manufactures, because such reduction may be brought about for the express purpose of crushing out some competitor or competitors."

§ 349. **Basis of Rules — (H) Miscellaneous Cases. —**

I. American Biscuit Combination. In *American Biscuit, etc. Co. v. Klotz*¹ the Court said: "We are not satisfied that the complaint's business is legitimate. While the nominal purpose of the complainant corporation, as stated in its charter, is the manufacture and sale of biscuit and confectionery, its real scope and purpose seem to be to combine and pool the large competing bakeries throughout the country into practically what is known and called a 'trust,' the effect of which is to partially, if not wholly, prevent competition, and enhance prices of necessary articles of food, and secure, if not a monopoly, a large control of the supply and prices in leading articles of breadstuffs."

II. National Lead Trust. In *National Lead Co. v. Grote Paint Store Co.*,² the Court of Appeals in Missouri said:

¹ *American Biscuit, etc. Co. v. Klotz*, 44 Fed. 723 (1891). The American Biscuit and Manufacturing Company was formed for the nominal purpose of manufacturing and selling biscuit and confectionery. In its actual operation it had acquired, at the time of this decision, control of thirty-five of the leading bakeries in twelve different States of the West and South. The stock of the company was parcelled out in payment for the plants acquired "on an agreed value of the property and a large estimate of good-will. Each bakery when secured to be carried on by its former managers, subject, however, as to control of funds, territory, prices, and competition to the central management; all profits pooled, and of course, division thereof to be

made on the basis of the stock assigned to each bakery" (p. 724).

Klotz & Co. sold their biscuit and confectionery business to the combination for stock at an agreed valuation. One Klotz, of the firm of Klotz & Co., continued to manage the business as agent for the company for some time, when he repudiated the transfer and resumed possession of the property in behalf of Klotz & Co. The American Biscuit and Manufacturing Company then brought suit for an injunction, accounting and receiver. The Court declined to appoint a receiver in interlocutory proceedings for the reasons stated in the text.

² *National Lead Co. v. Grote Paint Store Co.*, 80 Mo. App. 266 (1899).

The question involved in this case

"That the predecessor of the plaintiff, the 'National Lead Trust,' was an unlawful combination, both in purpose and fact, is sufficiently established by the nature of the agreement under which it was created and the methods and practices resorted to in furtherance of that agreement. The agreement can only be construed as a contract to suppress competition, fix the price of commodities and limit their production, and to restrain trade. Unless some one or all of these purposes had been entertained by the signers of the trust agreement, it would not have contained provisions looking to the acquisition by the trustees of the entire lead business of the country, nor would it have united, in the accomplishment of that end, a majority of the stockholders of the largest corporations dealing in that product. . . . While the conclusion of the illegal purpose of the trust agreement is irresistible upon a consideration of its several provisions and the manner in which they were carried out, it will appear from an examination of the cases that this result had been declared by every court called upon to review that agreement, or others substantially like it."

III. National Harrow Company. In *National Harrow Co. v. Hench* ¹ Judge Acheson said: "It will be perceived that the corporation, through whose instrumentality the purposes

was whether the plaintiff corporation, successor to the "Trust," was a party to an illegal combination in violation of the Missouri anti-trust act, and the case is considered in connection with that act. See *post*, ch. 42: "*Construction and Application of State Anti-trust Statutes.*"

¹ *National Harrow Co. v. Hench*, 76 Fed. 669 (1896); *affirmed* 83 Fed. 36 (1897). Certain manufacturers of spring-tooth harrows—about twenty corporations and firms—assigned the patents owned by them—eighty-five in number—to the National Harrow Company, a New York corporation formed for the purpose, receiving, in return, shares of stock in such company in proportion to the value of the patents. The National Harrow Company then gave back to each manufacturer a

license to manufacture the particular kind of harrow previously made, but reserved the right to fix the price at which the same should be sold. A certain manufacturer having failed to fulfil the conditions of the license, the National Harrow Company sued for an injunction, which was denied upon the grounds stated in the opinion.

For other cases holding the National Harrow Company an unlawful combination see *National Harrow Co. v. Bement*, 21 App. Div. (N. Y.) 290 (1897), (47 N. Y. Supp. 462); *National Harrow Co. v. Quick*, 67 Fed. 130 (1895); *Strait v. National Harrow Co.*, 18 N. Y. Supp. 224 (1891). Compare *Strait v. National Harrow Co.*, 51 Fed. 819 (1892); *Bement v. National Harrow Co.*, 22 Sup. Ct. Rep. 747 (1902).

of the combination are effected, is simply clothed with the legal title to the assigned patents, while the several assignors are invested with the exclusive right to sell and manufacture their old style of harrows under their own patents; but all of them must sell at uniform prices and upon the same terms, without respect to cost or the merits of their respective styles of harrows, and all the members of the combination are strictly forbidden to manufacture or sell any other style or kind of float spring-tooth harrow than they are thus licensed to make and sell. Now, it is quite evident to me, as well by the papers themselves as from the testimony of witnesses, that this scheme was devised for the purpose of regulating and enhancing prices for float spring-tooth harrows, and controlling the manufacture thereof throughout the whole country, and that the combination, especially by force of the numbers engaged therein, tends to stifle all competition in an important branch of business. I am not aware that such a far-reaching combination as is here disclosed has ever been judicially sustained. On the contrary, the courts have repeatedly adjudged combinations between a number of persons engaged in the same general business to prevent competition among themselves, and maintain prices, to be against sound policy, and therefore illegal."

IV. Cases of Associations. Of an association of manufacturers for the purpose of regulating the price of wire cloth, a New York court¹ said: "The people have a right to the necessities and conveniences of life at a price determined by the relation of supply and demand, and the law forbids any agreement or combination whereby that price is removed beyond the salutary influence of legitimate competition."

Of an association for the purpose of controlling the manufacture and sale of salt, the Supreme Court of Ohio² said: "Public policy, unquestionably, favors competition in trade, to the end that its commodities may be afforded to the con-

¹ *De Witt Wire Cloth Co. v. New Jersey Wire Cloth Co.*, 16 Daly (N. Y.), 529 (1891), (14 N. Y. Supp. 278). ² *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 672 (1880).

sumer as cheaply as possible, and is opposed to monopolies, which tend to advance market prices to the injury of the general public."

And in the leading case of *Morris Run Coal Co. v. Barclay Coal Co.*,¹ already referred to at length, the Court said of an association of five coal companies: "This combination has a power in its confederated form which no individual action can confer. The public interest must succumb to it, for it has left no competition free to correct its baleful influence."

CHAPTER XXXV.

RULES OF PUBLIC POLICY.

§ 350. In General.

§ 351. Distinction between Rules of Public Policy applicable to Private and Quasi-public Corporations.

§ 352. Rules.

§ 353. Rules Conservative Standards.

§ 354. Analysis of Rule governing Private Corporations. Form of Combination immaterial.

§ 355. Analysis of Rule — Objects and Tendencies of Combinations.

§ 356. Analysis of Rule — Control of the Market.

§ 357. Analysis of Rule — Extent of Territory.

§ 358. Analysis of Rule — Useful Commodities.

§ 359. Analysis of Rule applicable to Quasi-public Corporations.

§ 350. In General. — In formulating the rules of public policy stated in this chapter from the decisions of the courts which form their basis, the cases have been examined with a view of ascertaining and harmonizing, so far as possible, their underlying principles. No attempt has been made to follow the language, or to use the particular expressions employed in the opinions. Thus, the phrase "control of the market," in the rule governing private corporations, appears in few cases, but it is made use of because it appears to embody, in a concise expression, the conception of the courts

¹ *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 186 (1871). See *ante*, § 328, notes.

in the phrases "destruction of competition," "establishment of a virtual monopoly," "control of supply and prices," "control of all trade in the business" and others of a similar nature. So the phrase "useful commodity," in the rule, has seldom been employed by the courts, but it includes "the necessities of life" mentioned in many cases, and places only a slight — though necessary — limitation upon the "commodities of commerce" referred to in others.

§ 351. **Distinction between Rules of Public Policy applicable to Private and Quasi-public Corporations.** — A rule of public policy governing industrial combinations applies alike to private corporations and individuals. The right of trading and producing companies to combine is not affected by their corporate character, except so far as principles of corporation law are involved. In framing a rule for determining the validity of such combinations, regard must be had, on the one hand, to the right of contract, and, on the other, to the effect of the exercise of the right upon the public welfare.

Quasi-public corporations, in consideration of the grant of special privileges and franchises, assume the performance of public duties. In formulating a rule of public policy respecting such corporations, it is of primary importance to regard the corporation as a party to a contract with the State, and to consider the effect of a combination upon its ability to perform, in a manner most beneficial to the public, the obligations it has assumed.

The State has an indirect interest in combinations of private corporations to see that nothing is done prejudicial to the public welfare. It has a direct contractual interest to see that the grantee of public franchises properly fulfils its covenants.

§ 352. **Rules.** — (1) *Any combination of corporations or individuals the object of which is, or the necessary or natural consequence of the operation of which will be, the control of the market for a useful commodity, is against public policy and unlawful.*

(2) *Any combination of quasi-public corporations, the object of which is, or the necessary or natural consequence of the*

operation of which will be, the increase of charges beyond reasonable rates, or the curtailment of facilities afforded the public, is against public policy and unlawful.

§ 353. **Rules Conservative Standards.**—The rules state conservative standards. That relating to private corporations furnishes rather a test of illegality than of legality. There are, undoubtedly, combinations contrary to public policy which do not contravene its provisions, but, on the other hand, it is believed that every combination which does come within its provisions is against public policy and invalid. Combinations for the restriction of competition, not amounting to a control of the market, have, in many cases, been declared invalid. But conflicting decisions are equally numerous, and the line between lawful and unlawful restriction is not readily drawn. Unlawful combinations may be in such form that it is impossible to say that their object is to control the market for a commodity, but these are exceptions and will often be found to be within the rule applicable to *quasi*-public corporations.

The latter rule was more readily formulated and is more easily applied. The nature of the *quasi*-public corporation enters into the rule. Any combination which interferes with the performance, in the most advantageous manner, of its obligations to the State is against public policy.

§ 354. **Analysis of Rule Governing Private Corporations. Form of Combination immaterial.**—The test of the legality of a combination lies in its object and not in its form. The view that a combination by means of a purchasing corporation is less vulnerable than other forms of combination is well founded only with reference to questions of corporation law.

An association of corporations may be *ultra vires* of its members; a trust contravenes elementary legal principles; a corporate combination, *per contra*, may be formed through the exercise of the ordinary corporate powers of purchase and sale. But the same principles of public policy are applicable. That which public policy forbids in the case of

an association or trust cannot lawfully be done by a corporate combination, and *vice versa*.¹

A distinction has been drawn between contracts of independent manufacturers, for the purpose of restricting competition, and the purchase by one corporation, under the power contained in its charter, of the properties and business of competing corporations, which may have the effect of suppressing competition. The suppression of competition, in the former case, is said to be opposed to public policy; while, in the latter case, it is declared to be only the necessary result of the exercise of an express statutory power. Thus, in *Trenton Potteries Co. v. Olyphant*,² the Supreme Court of New Jersey said: "Contracts by independent and unconnected manufacturers or traders looking to the control of the prices of their commodities, either by limitation of production, or by restriction on distribution, or by express agreement to maintain specified prices, are, without doubt, opposed to public policy. . . . Corporations, however, may lawfully do any acts within the corporate powers conferred on them by legislative grant. . . . Under such powers, it is obvious that a corporation may purchase the plant and business of competing individuals and concerns. The legislature might have withheld such powers, or imposed limitations upon their use. In the absence of prohibition or limitation on their powers in this respect, it is impossible for the courts to pronounce acts, done under legislative grants, to be inimical to public policy. The grant of the legislature authorizing and permitting such acts must fix for the courts the character and limit of public policy in that regard. It

¹ *Harding v. American Glucose Co.*, 182 Ill. 615 (1899), (55 N. E. Rep. 577, 74 Am. St. Rep. 235): "A trust has usually appeared in the form of an agreement between stockholders in many corporations to place all their stock in the hands of trustees, and to receive trust certificates therefor from the trustees. But the question in the present case is whether a trust is created where a majority of stockholders con-

solidate their interests by conveying all their property to a corporation, organized for the purpose of taking their property. Any combination of competing corporations for the purpose of controlling prices, or limiting production, or suppressing competition, is contrary to public policy, and is void."

² *Trenton Potteries Co. v. Olyphant*, 58 N. J. Eq. 507 (1899), (43 Atl. Rep. 728).

follows that a corporation, empowered to carry on a particular business, may lawfully purchase the plant and business of competitors, although such purchases may diminish, or for a time, at least, destroy, competition. Contracts for such purchases cannot be refused enforcement."

These conclusions may be well founded in their application to an *actual* sale in the transaction of business, as distinguished from a combination in the form of a sale.¹ A corporation, having general power to dispose of its property, may, like an individual, in good faith, sell to a competing corporation without violating the rule of public policy.² There is no *combination* in such a purchase. But if the sale is for the purpose of forming a corporate combination, in which the vendor corporation participates, the same rule of public policy is applicable as in the case of any combination of corporations. As already stated, the object of a combination, or the necessary or natural consequence of its operation, determines its legality. The form—trust, corporate combination or association—will not serve as a cloak for conspiracy nor prevent the application of the rule of public policy.

Corporate power to purchase no more authorizes the exercise of such power for purposes opposed to public policy,

¹ *National Lead Co. v. Grote Paint Store Co.*, 80 Mo. App. 267 (1899): "The record in the case under review shows that the beneficial owners of the property were the subscribers to the National Lead Trust and holders of its certificates, and that these same persons remained the beneficial owners of the same property after it was converted into the capital of the plaintiff corporation, the only difference being that each holder of a trust certificate received, in lieu thereof, shares of stock in the new corporation at an agreed rate of exchange, and the further fact that the legal title to the property was put into a corporate entity of a body of nine trustees appointed under the trust agreement. The sale itself was titular rather than real."

² In *Carter-Crume Co. v. Peurrung*, 86 Fed. 439 (1898), the plaintiff entered into contracts with several manufacturers of butter-dishes for the purchase of their products. Its purpose was to control the market for these articles, but the manufacturers had no knowledge of, and did not participate in, such unlawful purpose. In sustaining one of these contracts the Court said: "The transaction with Peurrung Brothers & Co. was, on its face, legitimate, and it cannot be impeached simply by evidence that the Carter-Crume Company understood and intended it as one step in a general illegal scheme for monopolizing the trade in wooden butter-dishes and controlling prices."

than a general power to make contracts authorizes the execution of agreements conflicting with the public interests.¹

§ 355. **Analysis of Rule—Objects and Tendencies of Combinations.** — Where the objects and purposes of a combination of corporations, as stated in the instruments of its formation, are, upon their face, contrary to public policy, the combination is, manifestly, void. But an affirmation of purposes inimical to public policy is hardly to be expected from the organizers of a combination, and the law does not place a premium upon evasion by making the test of validity the object stated. On the contrary, the court, in determining the validity of a combination, upon grounds of public policy, should place itself in the position of its members at the time of its formation, and, from that point of view, determine the real, and not the ostensible, purpose of the combination.

As said by Judge Daniels in the *Sugar Trust Case*:² “The law does not require that instruments of this description, before they may be declared to be illegal, shall, in plain language, affirm the intention to be to prevent competition and control the market, or advance the prices of necessary commodities. . . . But the courts, as in other cases, are permitted to place themselves in the position of the parties entering into the agreement or arrangement to discover the objects or designs by which they may have been actuated.”

Moreover, in determining the validity of a combination upon principles of public policy, its actual effect when put

¹ As to the *power* of a corporation to purchase competing plants for the purpose of suppressing competition see *Distilling, etc. Co. v. People*, 156 Ill. 491 (1895), (41 N. E. Rep. 188), where the Court said: “But it is urged that the defendant, by its charter, is authorized to purchase and own distillery property, and that there is no limit placed upon the amount of property which it may thus acquire. By its certificate of organization, it is authorized to engage in a general distillery business in Illinois and elsewhere, and to own the property necessary for that purpose. . . . The defendant is authorized to own such

property as is necessary for carrying on its distillery business, and no more. Its power to acquire and hold property is limited to that purpose; and it has no power, by its charter, to enter upon a scheme of getting into its hands and under its control all, or substantially all, the distillery plants and the distillery business of the country, for the purpose of controlling production and prices, of crushing out competition, and of establishing a virtual monopoly in that business.”

² *People v. North River Sugar Refg Co.*, 54 Hun (N. Y.), 376 (1889), (3 N. Y. Supp. 401).

into operation is immaterial. The question is not what has been done under the combination but what might have been done under it.¹ The inquiry is whether a natural result of the operation of the combination would be prejudicial to the public interests.²

The courts have generally held that a combination is void as being against public policy, the tendency of which is injurious to the public.³ Testing the validity of acts or contracts by their tendencies, real or supposed, is making a standard of that which is essentially uncertain and indefinite. Two courts may honestly disagree as to the tendency of a particular agreement, and the phrase "injurious tendency" is too often a generality taking the place of exact

¹ *People v. Sheldon*, 139 N. Y. 251 (1893), (34 N. E. Rep. 785): "The question here does not turn on the point whether the agreement between the retail dealers in coal did, as a matter of fact, result in injury to the public, or to the community in Lockport. The question is, Was the agreement one, in view of what might have been done under it and the fact that it was an agreement, the effect of which was to prevent competition among the coal dealers, one upon which the law fastens the brand of condemnation?"

Judd v. Harrington, 139 N. Y. 105 (1893), (34 N. E. Rep. 790): "Courts will not aid parties seeking to enforce such an agreement, irrespective of the question whether, in fact, it produced the evil results to which it tended, or was harmless. . . . The illegal character of the agreement appeared upon its face, and was a necessary legal conclusion from its provisions."

² *Texas Standard Oil Co. v. Adone*, 83 Tex. 650 (1892), (19 S. W. Rep. 274, 29 Am. St. Rep. 690): "The agreement may be illegal if the natural or necessary consequences of its operation are to prevent competition and create fictitious prices independent of the law of demand and supply and to such an extent as to injuriously affect the interests of the public, or the interests of any particular

class of citizens who may be especially interested, either as producers or consumers, in the articles or staples which are the subject of the restrictions imposed by the contract."

³ *Anheuser-Busch Brew. Ass'n v. Houck* (Tex. 1894), 27 S. W. Rep. 696: "The effect on the public of an agreement which is against public policy is not essential; the tendency is enough to bring it within the condemnation of the courts."

Nester v. Continental Brewing Co., 161 Pa. St. 481 (1894), (29 Atl. Rep. 102): "Courts will not stop to inquire as to the degree of injury inflicted. It is enough to know that the natural tendency of such contracts is injurious."

Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 672 (1880): "The clear tendency of such an agreement is to establish a monopoly and destroy competition in trade, and, for that reason, on grounds of public policy, courts will not aid in its enforcement. It is no answer to say that competition in the salt trade was not, in fact, destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public."

reasoning. The distinction between the natural consequences of the operation of a combination and its tendencies may be slight but it is essential.

§ 356. **Analysis of Rule—Control of the Market.**—The phrase “control of the market,”¹ as employed in the rule of public policy, means the control of the disposition of a given product in a given market. It involves, primarily, the suppression of competition, and, as incidental thereto:

(1) The control of production.

(2) The regulation of prices.

It is not essential, however, to the control of the market, within the rule, that it should be complete. Practical control is sufficient; and this does not imply an absolute elimination of competition.²

Richardson v. Buhl, 77 Mich., 660 (1889), (43 N. W. Rep. 1102), (Champlin J., concurring opinion): “Such a vast combination as has been entered into under the above name is a menace to the public. Its object and direct tendency is to prevent free and fair competition, and control the prices throughout the national domain.”

See also *Addyston Pipe, etc. Co. v. United States*, 175 U. S. 211 (1899), (20 Sup. Ct. Rep. 96); *United States v. Trans-Missouri Freight Ass’n*, 166 U. S. 290 (1897), (17 Sup. Ct. Rep. 540); *State v. Portland Natural Gas, etc. Co.*, 153 Ind. 483 (1899), (53 N. E. Rep. 1089); *Stanton v. Allen*, 5 Denio (N. Y.), 434 (1848); *State v. Nebraska Distilling Co.*, 29 Neb. 700 (1890), (46 N. W. Rep. 155); *Distilling and Cattle Feeding Co. v. People*, 156 Ill. 448 (1895), (41 N. E. Rep. 188).

¹ The term “monopoly” has, likewise, been defined as “the control of a given product in a given market.” While, for reasons already indicated, the use of the term “monopoly” is undesirable in stating a rule of public policy, the decisions of the courts which use the term in the sense stated, may properly be referred to as illustrating the rule.

² *De Witt Wire Cloth Co. v. New*

Jersey Wire Cloth Co., 16 Daly (N. Y.), 529 (1891), (14 N. Y. Supp. 277): “Neither need the agreement nor combination, in order to expose it to the denunciation of the law, constitute a complete monopoly or effect a total suppression of competition; but the language of courts and of writers is that, if the agreement tends to a monopoly or to reduce or lessen competition, it is contrary to public policy and unlawful, because operating *pro tanto* an artificial enhancement of price.”

In the *Sugar Trust Case* (*People v. North River Sugar Refg Co.*, 54 Hun (N. Y.), 354 note (1889)), Judge Barrett said: “This rule is applicable to every monopoly, whether the supply is restricted by nature or susceptible of indefinite production. The difficulty of effecting the unlawful purpose may be greater in one case than in the other, but it is never impossible. Nor need it be permanent or complete. It is enough that it may be even temporarily and partially successful.”

See also *Texas Standard Oil Co. v. Adoue*, 83 Tex. 650 (1892), (19 S. W. Rep. 274, 29 Am. St. Rep. 690). Also *Addyston Pipe, etc. Co. v. United States*, 175 U. S. 211 (1899), (20 Sup. Ct. Rep. 108).

On the other hand a mere restriction of competition does not give control of the market and is not unlawful.¹ The

¹ Public policy regarding competition, as manifested by divergent judicial decisions, is indicated by the following extracts from opinions of courts in different States and in England:

California. *Herriman v. Menzies*, 115 Cal. 22 (1896), (44 Pac. Rep. 660): "Combinations between individuals or firms for the regulation of prices, and of competition in business, are not monopolies, and are not unlawful as in restraint of trade, so long as they are reasonable, and do not include all of a commodity or trade, or create such restrictions as to materially affect the freedom of commerce."

Compare Santa Clara Valley Mill, etc. Co. v. Hayes, 76 Cal. 392 (1888), (18 Pac. Rep. 391): "When agreements are resorted to for the purpose of taking trade out of the realm of competition, and thereby enhancing or depressing prices of commodities, the courts cannot be successfully invoked, and their execution will be left to the volition of the parties thereto."

Illinois. *Harding v. American Glucose Co.*, 182 Ill. 615 (1899), (55 N. E. Rep. 577, 74 Am. St. Rep. 235): "Any combination of competing corporations for the purpose of controlling prices, or limiting production, or suppressing competition, is contrary to public policy and is void. . . . The public policy of the State of Illinois has always been against trusts and combinations organized for the purpose of suppressing competition and creating monopoly."

See also *ante*, § 344: "*Basis of Rule — (C) Whiskey Trust Cases*;" *ante*, § 345: "*Basis of Rule — (D) Case of the Preservers Trust*;" *ante*, § 346: "*Basis of Rule — (E) Case of the Chicago Gas Trust*."

Indiana. *State v. Portland National Gas, etc. Co.*, 153 Ind. 483 (1899), (53 N. E. Rep. 1089): "It is an old and familiar maxim that 'competition is the life of trade,' and whatever act destroys competition, or even relaxes it, upon the

part of those who sustain relations to the public, is regarded by the law as injurious to public interests, and is, therefore, deemed to be unlawful, on the grounds of public policy."

Kentucky. *Anderson v. Jett*, 89 Ky. 375 (1889), (12 S. W. Rep. 670): "Rivalry is the life of trade. The thrift and welfare of the people depend upon it. Monopoly is opposed to it all along the line. The accumulation of wealth out of the brow sweat of honest toilers by means of combinations is opposed to competing trade and enterprise. That public policy that encourages fair dealing, honest thrift, and enterprise among all the citizens of the commonwealth, and is opposed to monopolies and combinations because unfriendly to such fair dealing, thrift, and enterprise, declares all combinations whose object is to destroy or impede free competition between the several lines of business engaged in utterly void."

Michigan. See *ante*, § 347: "*Basis of Rule — (F) Case of the Diamond Match Company*."

New Hampshire. *Manchester, etc. R. Co. v. Concord R. Co.*, 66 N. H. 127 (1889), (20 Atl. Rep. 383): "While, without doubt, contracts which have a direct tendency to prevent a healthy competition are detrimental to the public, and, consequently, against public policy, it is equally free from doubt that when such contracts prevent an unhealthy competition . . . they are beneficial, and in accord with sound principles of public policy."

New Jersey. *Meredith v. Zinc and Iron Co.*, 55 N. J. Eq. 221 (1897), (37 Atl. Rep. 539): "Now, I am unable to find any foundation, either in law or in morals, for the notion that the public have the right to have these private owners of this sort of property continue to do business in competition with each other. No doubt the public has reasonable ground to entertain its hope and expectation that its individual members

commercial maxim, "competition is the life of trade," while not adopted as a maxim of jurisprudence, finds a place in

will generally, in their several struggles to acquire the means of comfortable existence, compete with each other. But such expectation is based entirely upon the exercise of the free will and choice of the individual, and not upon any legal or moral duty to compete, and can never, from the nature of things, become a matter of right on the part of the public against the individual." See also *Trenton Potteries Co. v. Olyphant*, 58 N. J. Eq. 507 (1899), (43 Atl. Rep. 723).

New York. Vinegar Co. v. Foehrenbach, 148 N. Y. 64 (1895), (42 N. E. Rep. 403): "But not all combinations are condemned, and self-preservation may justify the prevention of undue and ruinous competition, when the prevention is sought by fair and legal methods."

Judd v. Harrington, 139 N. Y. 105 (1893), (34 N. E. Rep. 790): "The real purpose and intent of the agreement was to suppress competition in an article of food, and as such agreements tend to advance the price, they are regarded as detrimental to the public interest, and contrary to public policy."

Diamond Match Co. v. Roeber, 106 N. Y. 483 (1887), (13 N. E. Rep. 419): "We suppose a party may legally purchase the trade and business of another for the very purpose of preventing competition."

Cohen v. Berlin and Jones Envelope Co., 38 App. Div. (N. Y.) 499 (1899), (56 N. Y. Supp. 588): "It cannot be doubted but that the defendant had the right to buy out all the envelope manufacturing business, and even though they thereby obtained power to end competition and arbitrarily fix prices."

Rafferty v. Buffalo City Gas Co., 37 App. Div. (N. Y.) 623 (1899), (56 N. Y. Supp. 288): "A contract made to prevent or avoid destructive competition is not necessarily invalid."

Chappell v. Brockway, 21 Wend. 157 (1839): "Competition in business,

though greatly beneficial to the public, may be carried to such an extent as to become an evil."

See also *ante*, § 342: "*Basis of Rule — (A) Case of the Sugar Trust.*"

Ohio. Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 672 (1880): "Public policy, unquestionably, favors competition in trade, to the end that its commodities may be afforded to the consumer as cheaply as possible, and is opposed to monopolies, which tend to advance market prices, to the injury of the general public."

See also *ante*, § 343: "*Basis of Rule — (B) Case of the Standard Oil Trust.*"

Pennsylvania. Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 186 (1871): "When competition is left free, individual error or folly will generally find a correction in the conduct of others. But here is a combination of all the companies operating in the Blossburg and Barclay mining regions, and controlling their entire productions. . . . The public interest must succumb to it, for it has left no competition free to correct its baleful influence."

Rhode Island. Oakdale Mfg. Co. v. Garst., 18 R. I. 484 (1894), (28 Atl. Rep. 973): "Undoubtedly, there may be combinations so destructive of the right of the people to buy and sell, and to pursue their business freely, that they must be declared to be void upon the ground of public policy. In such cases, the injury to the public is the controlling consideration. But it does not follow that every combination in trade, even though such combination may have the effect to diminish the number of competitors in business, is illegal. . . . Combinations for mutual advantage which do not amount to a monopoly, but leave the field of competition open to others, are neither within the reason nor the operation of the rule."

Texas. Texas Standard Oil Co. v. Adoue, 83 Tex. 650 (1892), (19 S. W.

many decisions, and the language of the courts is often broad enough to include, as opposed to public policy, every combination in restraint of competition, regardless of degree. But the weight of authority — as well as sound principle — supports the view that every combination restricting competition is not invalid — that restriction, to be unlawful, while not necessarily amounting to total suppression, must give, substantially, the control of the market.

Just where the line is to be drawn between a lawful and unlawful restriction of competition — just what restriction is practical suppression — must depend largely upon the facts and circumstances of each case. As said in *Hoffman v. Brooks*,¹ a case not officially reported: "Those engaged in any trade or business may, to such limited extent as may be fairly necessary to protect their interests, enter into agreements which will result in diminishing competition and increasing prices. Just the extent to which this may be done courts have been careful not to define, just as they have refused to set monuments along the line between fairness and fraud."

Rep. 274, 29 Am. St. Rep. 690). See extract from this decision in note to last section.

Wisconsin. Kellogg v. Larkin, 3 Pin. 150 (1851), (56 Am. Dec. 180): "I apprehend it is not true that competition is the life of trade. On the contrary, that maxim is one of the least reliable of the host that may be picked up in every market-place. It is, in fact, the shibboleth of mere gambling speculation, and is hardly entitled to take rank as an axiom in the jurisprudence of this country. . . . Indeed, by reducing prices below, or raising them above values (as the nature of the trade prompted), competition has done more to monopolize trade, or to secure exclusive advantages in it, than has been done by contract. Rivalry in trade will destroy itself, and rival tradesmen seeking to remove each other, rarely resort to contract, unless they find it the cheapest mode of putting an end to the strife."

England. Mogul Steamship Co. v. McGregor, L. R. App. Cas. 25 (1892), (61 L. J. R. 295), (Lord Bramwell): "In these days of instant communication with almost all parts of the world, competition is the life of trade, and I am not aware of any stage of competition called "fair," intermediate between lawful and unlawful. The question of fairness would be relegated to the idiosyncrasies of individual judges. I can see no limit to competition, except that you shall not invade the rights of another."

Canada. Ontario Salt Co. v. Merchants Salt Co., 18 Grant's Ch. 540 (1871): "I know of no rule of law ever existing which prohibited a certain number (not all) of the producers of a staple commodity agreeing not to sell below a certain price."

¹ *Hoffman v. Brooks*, 11 Cincinnati Week. Law Bull. 259 (1884), 23 Am. Law. Reg. 648.

§ 357. **Analysis of Rule — Extent of Territory.** — A combination to control the markets of the world for a useful commodity would contravene the rule of public policy. A combination for the purpose of controlling the market in a particular locality would be equally unlawful. The phrase “control of the market” means the control of any market.

No limit of territory can or should be prescribed. The dealers in a village might combine to control the market for a necessary of life. In order to accomplish their object, they must control the ordinary sources of supply of the village. Manufacturers throughout the United States might combine to control the markets of the country for their product. Their purpose could only be attained by having under their power the sources of supply of the country. The result to the public from each combination would be the same. Competition, in each case, would be suppressed, and, consequently, prices raised and production limited. The difference would be only in degree, and each combination would be against public policy and invalid.¹

¹ *Texas Standard Oil Co. v. Adone*, 83 Tex. 650 (1892), (19 S. W. Rep. 274, 29 Am. St. Rep. 690): “We can scarcely conceive how mere territorial limits can be the controlling test, in all instances, of the legality of the restraints imposed upon the ordinary course of trade. This criterion may do very well when applied to the occupation or profession of one man, or even a few individuals; for neither their labor, industry, business, nor services, may be so necessary to the public as not to be dispensed with without inconvenience or injury. It appears to us, however, that the case is very different in regard to trade or commerce in those articles of prime necessity, or even of very frequent use among a large number of people in any given locality. Does any one doubt that a combination of a number of the most extensive dealers in flour, meat or oils, etc., in one great city, to sell those commodities at only one price or not at all, within

the limits of that city, would affect the interests of the public, and, perhaps, also some of the individual dealers, much more extensively and disastrously than a similar agreement extended to a much greater area of country, but in which only a few people reside, or require such articles? It would seem that the injurious effects upon the public interests would be in proportion to the number of people affected by the restrictions, though we are not unaware that this position has not been deemed tenable by some of the authorities in cases where the right to exercise a trade or profession within a particular district or locality has been restricted by the contract. We think that territory cannot be the sole test, though in the present instance the contract embraces such extensive territory, and such a number of localities as to bring it even within that rule.”

Hoffman v. Brooks, 11 Cincinnati Weekly Law Bull. (Ohio) 259 (1884),

§ 358. *Analysis of Rule — Useful Commodities.* — The old English offences of regrating, forestalling and engrossing, — crimes in the days of Edward VI. and approved methods of doing business at the present time, — related exclusively to certain forms of traffic in the *necessaries of life*.¹

The influence of the early statutes and decisions against those offences has not yet entirely died out. The term “engross” is not infrequently used in connection with

23 Am. Law Reg. 648: “The presumption is always against the validity of such agreements [in restraint of competition], and, certainly, where they include all those engaged in any business in a large city or district, are unlimited in duration, and are manifestly intended, by the surrender of individual discretion, by the arbitrary fixing of prices, or by any of the methods to which the hope of gain makes human ingenuity so faithful, to strangle competition outright, and breed monopolies, the law, while it may not punish, will not enforce them.”

Chapin v. Brown, 83 Iowa, 156 (1891), (48 N. W. Rep. 1074): “The agreement is against public policy. It plainly tends to monopolize the butter trade at Storm Lake, and destroy competition in that business. It is not necessary that the enforcement of the agreement should actually create a monopoly in order to render it invalid, and, surely, where all the dealers in a commodity in a certain locality agree to quit the business, and the plaintiffs are installed as the only dealers in that line, the tendency is, for a time, at least, to destroy competition, and leave the plaintiffs as the only dealers in that species of property in that locality. Such contracts cannot be enforced.”

Santa Clara Valley Mill, etc. Co. v. Hayes, 76 Cal. 387 (1888), (18 Pac. Rep. 391): “Here it [the plaintiff] entered into a contract with the object and view to suppress the supply and enhance the price of lumber in *four counties of the State*. The contract was void as being against public policy.”

¹ “*Regrating*: In old English law, the offence of buying or getting into one’s hands at a fair or market, any provisions, corn, or other dead victual, with the intention of selling the same again in the same fair or market, or in some other within four miles thereof, at a higher price. The offender was termed a ‘regrator.’” Black’s Law Dict.

“*Forestalling the Market*: The act of buying or contracting for any merchandise or provision on its way to the market, with the intention of selling it again at a higher price; or dissuading persons from bringing their goods or provisions there; or persuading them to enhance the price when there.” Black’s Law Dict. citing 4 Black Com. 158.

Engrossing: “Whatsoever person or persons that after said first day of May shall engross or get into his or their hands, by buying, contracting or promise-taking, other than by demise, grant or lease of land or tithe, any corn growing in the fields, or any corn or grain, butter, cheese, fish or other dead victuals whatsoever, within the realm of *England*, to the intent to sell the same again, shall be accepted, reputed and taken as unlawful engrosser or engrossers.” Statute 5th and 6th Edward VI., entitled, “An Act against Regraters, Forestallers, and Engrossers” (ch. 14, § 3).

The acts thus denominated offences are now recognized and approved as necessary methods of transacting business, and the change of public policy, with reference to them, furnishes an apt illustration of its fluctuating nature.

modern combinations, and the character of an article as one of "the necessities of life," as an "article of necessity" or "an article of prime necessity" — according to the particular phrase — is generally stated as a controlling reason why the suppression of competition therein is inimical to public policy.¹ A combination for the purpose of controlling the market for an article of necessity is against public policy. But the rule of public policy is of broader application.² The essential question is whether the article is a *useful commodity*,³ as distinguished from those "articles of commerce, which are, in no proper sense, necessities or even conveniences, but mere luxuries or appendages of vanity."⁴

¹ *Queen Ins. Co. v. State* (Tex. Civ. App. 1893), 22 S. W. Rep. 1048, 22 L. R. A. 192: "As we have said, these statutes (against engrossing, re-grating and forestalling) have been repealed in England. They were applicable to a condition of society which no longer exists. But it is to be presumed that the common-law principle which underlies them is the origin of the modern doctrine on the subject. We find that most of the cases in which agreements among manufacturers and dealers to increase the price of their wares and commodities were declared illegal, related to some merchantable article of necessity, or of great utility."

² In *United States v. E. C. Knight Co.*, 156 U. S. 12 (1895), (15 Sup. Ct. Rep. 248), Mr. Chief Justice Fuller said: "The argument is, that the power to control the manufacture of refined sugar is a monopoly over a necessary of life, to the enjoyment of which, by a large part of the population of the United States, interstate commerce is indispensable, and that, therefore, the general government, in the exercise of the power to regulate commerce, may repress such monopoly directly, and set aside the instruments which have created it. But this argument cannot be confined to necessities of life, merely, but must include all articles of general consumption."

See also *DeWitt Wire Cloth Co. v.*

New Jersey Wire Cloth Co., 16 Daly (N. Y.), 529 (1891), (14 N. Y. Supp. 279), where the Court said: "Nor is the operation of the rule forbidding contracts restricting competition and enhancing price, limited to trade in the necessities of life, but, as appears from the citations above, extends equally and alike to all commodities of commerce."

³ *Queen Ins. Co. v. State* (Tex. Civ. App. 1893), 22 S. W. Rep. 1048, 22 L. R. A. 491: "The word 'commodity' has two significations. In its most comprehensive sense, it means 'convenience, accommodation, profit, benefit, advantage, interest, commodiousness;' but, according to Webster's International Dictionary, the use of the word in this sense is obsolete. Page 286. The word is ordinarily used in the commercial sense of any movable or tangible thing that is ordinarily produced or used as the subject of barter or sale."

⁴ *Cummings v. Union Blue Stone Co.*, 164 N. Y. 405 (1900).

In *Herriman v. Menzies*, 115 Cal. 16 (1896), (44 Pac. Rep. 660), the Court said: "An agreement, the purpose or effect of which is to create a monopoly, is unlawful if it relate to some staple commodity, or thing, of general requirement and use, or of necessity, and not something of mere luxury or convenience."

No precise rule can be stated for determining what are articles of necessity.¹ The luxuries of the period of Edward

¹ I. *Combinations for the suppression of competition in the sale or production of the following articles have been held to be inimical to public policy, generally upon the ground that they are necessities of life.*

Alcohol. *State v. Nebraska Distilling Co.*, 29 Neb. 718 (1890), (46 N. W. Rep. 155): "Alcohol is an article of commerce. It is applied to a thousand uses in arts and manufactures. The amount which is rectified and used as intoxicating drinks forms but a very small part of the quantity actually distilled, and being an article of commerce, any contract creating a monopoly therein, is against public policy and void."

Beer. Held: An article of daily consumption and a combination therein unlawful. *Nester v. Continental Brew. Co.* (Pa.), 2 Dist. R. 177 (1894); on appeal, 161 Pa. St. 473 (1894), (29 Atl. Rep. 102).

Contra, however, *Anheuser-Busch Brewing Ass'n v. Houck* (Tex. 1894), (27 S. W. Rep. 692). See note 1, next page.

Brick. *Jackson v. Brick Ass'n*, 53 Ohio St. 303 (1895), (41 N. E. Rep. 257, 53 Am. St. Rep. 637).

Blue Stone. *Cummings v. Union Blue Stone Co.*, 164 N. Y. 405 (1900).

Biscuits and Confectionery. *American Biscuit, etc. Co. v. Klotz*, 44 Fed. 721 (1891).

Butter. *Chapin v. Brown*, 83 Iowa, 156 (1891), (48 N. W. Rep. 1074).

Candles. *Emery v. Ohio Candle Co.*, 47 Ohio St. 320 (1890), (24 N. E. Rep. 660, 32 Am. & Eng. Corp. Cas. 165).

Coal. *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173 (1871); *People v. Sheldon*, 139 N. Y. 251 (1893), (34 N. E. Rep. 785); *Arnot v. Pittston, etc. Coal Co.*, 68 N. Y. 558 (1877), (23 Am. Rep. 190); *Drake v. Siebold*, 81 Hun (N. Y.), 178 (1894), (30 N. Y. Supp. 697).

Cotton Bagging. *India Bagging Ass'n v. Kock*, 14 La. Ann. 169 (1859): "The agreement between the parties was palpably, and unequivocally, a combination in restraint of trade, and to enhance the price in the market of an article of prime necessity to cotton planters. Such combinations are contrary to public order, and cannot be enforced in a court of justice."

Cotton Seed. *Texas Standard Oil Co. v. Adone*, 83 Tex. 650 (1892), (19 S. W. Rep. 274, 29 Am. St. Rep. 690).

Glucose and its Products. *Harding v. American Glucose Co.*, 182 Ill. 551 (1899), (55 N. E. Rep. 577, 74 Am. St. Rep. 235.)

Grain. *Craft v. McConoughby*, 79 Ill. 346 (1875), (22 Am. Rep. 171).

Grain Bags and Burlap. *Pacific Factor Co. v. Adler*, 90 Cal. 110 (1891), (27 Pac. Rep. 361).

Ice. *Griffin v. Piper*, 55 Ill. App. 213 (1894).

Lumber. *Santa Clara Valley Mill, etc. Co. v. Hayes*, 76 Cal. 387 (1888), (18 Pac. Rep. 391, 9 Am. St. Rep. 211).

Matches. *Richardson v. Buhl*, 77 Mich. 632 (1889), (43 N. W. Rep. 1102).

Milk. *People v. Milk Exchange*, 145 N. Y. 267 (1895), (39 N. E. Rep. 1062); *Ford v. Chicago Milk Shippers Ass'n*, 155 Ill. 166 (1895), (39 N. E. Rep. 651).

Petroleum and its Products. *State v. Standard Oil Co.*, 49 Ohio St. 137 (1892), (30 N. E. Rep. 279).

Preserves. *American Preservers Trust v. Taylor Mfg. Co.*, 46 Fed. 152 (1891); *Bishop v. American Preservers Trust*, 157 Ill. 284 (1895), (41 N. E. Rep. 765).

Salt. *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666 (1890).

Sheep and Lambs. *Judd v. Harrington*, 139 N. Y. 105 (1893), (34 N. E. Rep. 790).

Spring Tooth Harrows. *National Harrow Co. v. Bement*, 21 App. Div. (N. Y.)

VI. have become the commonest of necessities, or have passed out of use altogether. In the present stage of civilization, the line between necessities and luxuries cannot be sharply drawn.

A fortiori is it impossible to lay down an exact rule for determining what is a useful commodity. There are few articles which are bought and sold which are not, in a sense, useful, and, consequently, few articles which are not within the rule of public policy ; except, perhaps, articles the use of which public policy requires should be restricted.¹

296 (1897), (47 N. Y. Supp. 462) : "A harrow is an implement as important and as generally used by farmers as a plow, and is quite as necessary for the proper cultivation of land as any other agricultural implement, and is in use in every properly cultivated farm. . . . I think it needs no argument to show that a combination formed for the purpose of controlling their prices, limiting their production, preventing competition among manufacturers, and also preventing further improvement in them, is contrary to public policy."

Sugar. *People v. North River Sugar Ref'g Co.*, 54 Hun (N. Y.), 354 (1889), (3 N. Y. Supp. 401) ; *affirmed* upon principles of corporation law, 121 N. Y. 582 (1890), (24 N. E. Rep. 834, 18 Am. St. Rep. 843).

Tobacco. *Hoffman v. Brooks*, 23 Am. Law Reg. 648 (1884), (11 Week. Law Bull. (Ohio) 258).

Wire Cloth. *De Witt Wire Cloth Co. v. New Jersey Wire Cloth Co.*, 16 Daly (N. Y.), 529 (1891), (14 N. Y. Supp. 277).

II. *The following articles have been held not to be articles of necessity :*

Curtain Fixtures. *Central Shade Roller Co. v. Cushman*, 143 Mass. 364 (1887), (9 N. E. Rep. 629) : "The agreement does not refer to an article of prime necessity nor to a staple of commerce, nor to merchandise to be bought and sold in the market, but to a particular curtain fixture of the parties' own manufacture."

Glue made from Fish Skins. *Gloucester Isinglass, etc., Co. v. Russia Cement Co.*, 154 Mass. 92 (1891), (27 N. E. Rep. 1005).

Laundry Machines. *Dolph v. Troy Laundry Mach. Co.*, 28 Fed. 553 (1886).

Zinc. *Meredith v. Zinc, etc. Co.*, 55 N. J. Eq. 211 (1897), (37 Atl. Rep. 539).

All these articles are, however, useful commodities within the rule of public policy.

¹ *Anheuser-Busch Brewing Ass'n v. Houck* (Tex. 1894), (27 S. W. Rep. 695) : "We think there can be no doubt that the rule that is to be derived from all the authorities condemns, as being against public policy, an agreement between two or more dealers, in an article of prime necessity or in general use among the people, whereby they agree to jointly control the supply of such article, to cease competition between themselves in respect to it, and to regulate the price thereof in a given community or market. . . . There may be a question as to whether beer is an article of necessity, but it admits of no question that it is an article of usual and general consumption and of use among the people. . . . Is beer one of those articles of consumption, though one in frequent use among the people, the sale of which is not permitted by public policy to be limited by a contract in restraint of trade? We have concluded that it is not. The policy of the laws of the State is not towards the unrestricted or general sale of such article.

§ 359. **Analysis of Rule of Public Policy applicable to Quasi-public Corporations.** — While combinations of private corporations merely for the purpose of restricting competition are not invalid,¹ similar combinations of *quasi*-public corporations are, presumptively, against public policy.² The rule provides that every such combination is invalid if either of these consequences may follow its operation:

(1) The increase of charges beyond reasonable rates.

(2) The curtailment of facilities afforded the public.

The substance of the rule is that every combination of *quasi*-public corporations, which, without statutory authority, does or may deprive the public of the benefits accruing from separate control and management, is against public policy.³

The liquor traffic has always been kept in restraint by statutes imposing onerous conditions and regulations in reference to its pursuits, clearly evidencing a policy of not allowing every one to engage in the business at will."

Compare, however, *Nester v. Continental Brewing Co.*, 161 Pa. St. 473 (1894), (20 Atl. Rep. 102, 41 Am. St. Rep. 894), where the Court said: "The appellants insist that restraint of trade in the necessities of life only, is within the prohibition of public policy. No standard has been furnished by which to ascertain what constitutes these with reference to the general public. But assuming that beer is not among them, it is equally within the reach of the rule. The law recognizes it as a commodity, regulates its sales, it is 'an article of daily consumption,' and the court should refuse to aid in any attempted imposition upon the public by means of illegal combinations."

¹ *United States v. Trans-Missouri Freight Ass'n*, 58 Fed. 84 (1893): "Another distinction which is now firmly established and enforced grows out of the nature of the business contracted about, and the relation the contracting parties bear thereto. An individual or a private corporation engaged in a purely private enterprise may lawfully enter into contracts or combi-

nation in regard thereto which would be invalid and illegal if the business was of a public nature, and the corporation was created for the purpose of engaging therein."

² In *Cleveland, etc. R. Co. v. Closser*, 126 Ind. 360 (1890), (26 N. E. Rep. 159), the Supreme Court of Indiana said: "It is, however, both appropriate and necessary to adjudge that a combination between common carriers to prevent competition is, at least, *prima facie* illegal. The doubt is as to whether any ultimate purpose can save it from the condemnation of the law; there can be no doubt that, unexplained, such a combination, for such a purpose, is condemned by public policy. If such a combination can, in any event, be admitted to be legal, it can only be so when it is affirmatively shown that its object was to prevent ruinous competition, and that it does not establish unreasonable rates, unjust discriminations, or oppressive regulations. If such a contract can stand, it must be upon an affirmative showing, and one so full, complete, and clear as to remove the presumption (to which its existence, in itself, gives rise) that it was formed to do mischief to the public by repressing fair competition."

³ *United States v. Gibbs v. Consolidated Gas Co.*, 130 U. S. 408 (1889),

CHAPTER XXXVI.

APPLICATION OF RULES OF PUBLIC POLICY TO PARTICULAR
CLASSES OF COMBINATIONS.

- § 360. Associations of Manufacturers and Producers.
 § 361. Associations of Manufacturers owning Patents.
 § 362. Associations of Dealers.
 § 363. Associations of Railroad Companies. Traffic Contracts of Connecting Lines.
 § 364. Associations of Railroad Companies. Traffic Contracts of Competing Lines. Pools.
 § 365. Associations of Gas Companies and other Quasi-public Corporations.

§ 360. *Associations of Manufacturers and Producers.* — The application of the rule of public policy to trusts and corporate combinations formed by manufacturing and producing companies has been illustrated in the leading cases of combinations of that description which have already been reviewed.¹

Associations of competing manufacturers or producers, for the purpose of obtaining control of the market for their products, or for the restriction of competition, have been repeatedly entered into, and their validity has, in many cases, been passed upon by the courts.²

(9 Sup. Ct. Rep. 553); *Chicago, etc. R. Co. v. Wabash, etc. R. Co.*, 61 Fed. 996 (1894).

Illinois: *People v. Chicago Gas Trust Co.*, 130 Ill. 268 (1889), (22 N. E. Rep. 798, 17 Am. St. Rep. 319); *Chicago Gas Light, etc. Co. v. Peoples Gas Light, etc. Co.*, 121 Ill. 530 (1887), (13 N. E. Rep. 169, 2 Am. St. Rep. 124).

New York: *Compare Rafferty v. Buffalo City Gas Co.*, 37 App. Div. 618 (1899), (56 N. Y. Supp. 288).

West Virginia: *West Virginia Transp. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 625 (1883).

¹ See ante, § 342: "*Basis of Rules — (A) Case of the Sugar Trust*;" ante, § 343: "*Basis of Rules — (B) Case of*

the Standard Oil Trust;" ante, § 344: "*Basis of Rules — (C) Whiskey Trust Cases*;" ante, § 345: "*Basis of Rules — (D) Case of the Preservers Trust*;" ante, § 347: "*Basis of Rules — (F) Case of the Diamond Match Company*;" ante, § 348: "*Basis of Rules — (G) Case of the Glucose Combination*;" ante, § 349: "*Basis of Rules — (H) Miscellaneous Cases*."

² I. Cases holding associations of competing manufacturers or producers legal:

United States: *Dolph v. Troy Laundry Mach. Co.*, 28 Fed. 553 (1886).

Massachusetts: *Gloucester Isinglass, etc. Co. v. Russia Cement Co.*, 154 Mass. 92 (1891), (27 N. E. Rep. 1005); *Central Shade Roller Co. v. Cushman*,

As shown in a preceding section, these associations have taken various forms.¹ Agreements regulating prices, restricting production and creating selling agencies, have been, perhaps, the most common. Occasionally, novel devices have been adopted, in an attempt to avoid the effect of the decisions against combinations. Thus, an agreement was entered into by manufacturers fixing a price for their products far in excess of the market price, and stipulating that it might be reduced but not increased. It was contended that the contract, having fixed a maximum price, was not an agreement to raise prices, and, consequently, was not invalid. But it was held that the agreement, for all practical purposes, controlled prices and was illegal.²

143 Mass. 353 (1887), (9 N. E. Rep. 629).

Missouri: Skrainka v. Scharrington, 8 Mo. App. 522 (1880).

New Jersey: Meredith v. Zinc & Iron Co., 55 N. J. Eq. 212 (1897), (37 Atl. Rep. 539); Trenton Potteries Co. v. Olyphant, 58 N. J. Eq. 507 (1899), (43 Atl. Rep. 723).

New York: Cohen v. Berlin & Jones, Env. Co., 38 App. Div. 499 (1899), (56 N. Y. Supp. 588).

Rhode Island: Oakdale Mfg. Co. v. Garst, 18 R. L. 484 (1894), (28 Atl. Rep. 973.)

Canada: Ontario Salt Co. v. Merchants Salt Co., 18 Grant's Ch. 540 (1871).

II. *Cases holding associations of competing manufacturers or producers illegal*:

Alabama: Tuscaloosa Ice Mfg. Co. v. Williams, 28 So. Rep. 669 (1900).

California: Santa Clara Valley Mill, etc. Co. v. Hayes, 76 Cal. 387 (1888), (18 Pac. Rep. 391); Vulcan Powder Co. v. Hercules Powder Co., 96 Cal. 510 (1892), (31 Pac. Rep. 581, 31 Am. St. Rep. 242).

Michigan: Western Woodenware Ass'n v. Starkie, 84 Mich. 76 (1890), (47 N. W. Rep. 604).

New York: De Witt Wire Cloth Co. v. New Jersey Wire Cloth Co., 16 Daly, 529 (1891), (14 N. Y. Supp. 277); Cum-

tings v. Union Blue Stone Co., 164 N. Y. 405 (1900).

Ohio: Emery v. Ohio Candle Co., 47 Ohio St. 320 (1890), (24 N. E. Rep. 660; Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666 (1880); Jackson v. Brick Ass'n, 53 Ohio St. 303 (1895), (41 N. E. Rep. 257, 53 Am. St. Rep. 637).

Pennsylvania: Nester v. Continental Brew Co., 164 Pa. St. 473 (1894), (29 Atl. Rep. 102); Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173 (1871).

Texas: Texas Standard Oil Co. v. Adone, 83 Tex. 650 (1892), (19 S. W. Rep. 274).

¹ See *ante*, § 308: "Formation of Associations."

² National Harrow Co. v. Bement, 21 App. Div. N. Y. 290 (1897), (47 N. Y. Supp. 462). The Court said: "A contract fixing the prices of harrows at more than forty per cent above their value or selling prices, and authorizing the licensor to reduce, but not to increase, the prices, as effectually controls the prices for all practical purposes as though the power to increase had been expressly reserved to the plaintiff. It would hardly be practicable to fix the prices at more than forty-three or forty-five per cent above the selling prices of the harrows."

In another instance, for the purpose of restricting production, a manufacturer was paid a bonus in the form of rent to keep his plant idle. The arrangement was held to be against public policy.¹

It is, undoubtedly, the better view that a business corporation may in good faith purchase the plant of a competitor, although the effect is *pro tanto* to restrict competition; but it cannot do so as a part of a scheme, participated in by the vendor, to form a combination inimical to public policy.²

In applying the rule of public policy to combinations of manufacturers or producers the following propositions should be observed:

(1) No device can serve as a shield for an unlawful combination.

(2) An association for the restriction of competition through the regulation of prices is not necessarily unlawful.

(3) An association for the restriction of competition through the limitation of production is not necessarily unlawful.

(4) An association for the restriction of competition, either through the regulation of prices or limitation of production, becomes an association for the control of the market when the restriction becomes suppression.

(5) An association for the control of the market is an unlawful combination.

§ 361. **Associations of Manufacturers owning Patents.** — The grant of a patent confers upon the patentee, during its life, the exclusive control of the invention. He is governed only by economic considerations in fixing the price of the patented article, and may attach such conditions to its manufacture, sale, and use by others as he may deem expedient. The

¹ *American, etc. Co. v. Peoria, etc. Co.*, 65 Ill. App. 502 (1895). The scheme was held invalid under an anti-trust statute, but was undoubtedly illegal without it. See also *Fox, etc. Steel Co. v. Schoen*, 77 Fed. 29 (1896). Compare, *United States Chem. Co. v. Provident Chem. Co.*, 64 Fed. 964 (1894).

² *Carter-Crume Co. v. Peurrung*, 86

Fed. 439 (1898); *Coquard v. National, etc. Co.*, 171 Ill. 480 (1898), (49 N. E. Rep. 563); *Trenton Potteries Co. v. Olyphant*, 58 N. J. Eq. 507 (1899), (43 Atl. Rep. 723). Compare, however, *Lufkin Rule Co. v. Fringeli*, 57 Ohio St. 596 (1898), (49 N. E. Rep. 1030, 63 Am. St. Rep. 736); *Wittenberg v. Mollyneaux*, 60 Neb. 583 (1900).

monopoly is not created by his act but by the grant of the patent.

Upon similar principles, it is probable that different corporations, having the right as assignees or licensees to manufacture and sell under the *same* patent, may combine for the regulation of prices and production. Unless such a combination amounts to a conspiracy, the injury to the public resulting therefrom would seem rather to arise from the exclusive nature of the patent than from the combination. This question, however, is not definitely settled by authority.¹

It is clear, however, that owners of *different* patents cannot, by cross assignments or other means, enter into a combination for the control of the market for a useful article.² The fact that the combination involves patented articles in no way affects the application of the rule of public policy. Competition in the sale of an article, covered in varying forms by different patents, is as essential to the public welfare as competition in an unpatented article. The injury to the public, in such a case, is effected by the combination and not by the patent.

In *National Harrow Co. v. Hench*,³ Judge Butler said: "The fact that the property involved is covered by letters

¹ But see the very recent case of *Bement v. National Harrow Co.*, 22 Sup. Ct. Rep. 747 (1902).

² In *National Harrow Co. v. Hench*, 76 Fed. 667 (1896), (*affirmed* 83 Fed. 38) (1897), Judge Acheson said: "I am not able to concur in the view that the principle of these cases is applicable here, because the agreement in question involves patents. It is true that a patentee has the exclusive control of his invention during the life of the patent. He may practise the invention or not, as he sees fit, and he may grant to others licenses upon his own terms. But where, as was the case here, a large number of independent manufacturing concerns are engaged in making and selling, under different patents and in various forms, an extensively used article, competition between them is the natural and inevitable result, and thereby

the public interest is promoted. Therefore, a combination between such manufacturers, which imposes a widespread restraint upon the trade and destroys competition, is as injurious to the community and as obnoxious to sound public policy as if the confederates were dealing in unpatented articles."

See also *National Harrow Co. v. Quick*, 67 Fed. 130 (1895); *Strait v. National Harrow Co.*, 18 N. Y. Supp. 224 (1891); *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510 (1892), (31 Pac. Rep. 581, 31 Am. St. Rep. 242). But see *dicta* to the contrary in *Central Shade Roller Co. v. Cushman*, 143 Mass. 363 (1887), (9 N. E. Rep. 629). For review of the case of the Harrow Trust, see *ante*, § 349.

³ *National Harrow Co. v. Hench*, 83 Fed. 38 (1897).

patent is urged as a justification; but we do not see how any importance can be attributed to this fact. Patents confer a monopoly as respects the property covered by them, but they confer no right upon the owners of several distinct patents to combine for the purpose of restraining competition and trade. Patented property does not differ in this respect from any other. The fact that one patentee may possess himself of several patents, and thus increase his monopoly, affords no support for an argument in favor of a combination by several distinct owners of such property to restrain manufacture, control sales, and enhance prices. Such combinations are conspiracies against the public interests, and abuses of patent privileges. The object of these privileges is to promote the public benefit, as well as to reward inventors. The suggestion that the contract is justified by the situation of the parties—their exposure to litigation—is entitled to no greater weight. Patentees may compose their differences, as the owners of other property may, but they cannot make the occasion an excuse or cloak for the creation of monopolies to the public disadvantage.”

§ 362. **Associations of Dealers.**—In the application of the rule of public policy to associations of dealers the same principles govern as in the case of similar associations of manufacturers or producers.

Cases in which the courts have passed upon the validity of associations of dealers are collected in the footnote.¹

¹ I. *Cases holding associations of competing dealers legal:*

Fairbanks v. Leary, 40 Wis. 637 (1876); *Kellogg v. Larkin*, 3 Pin. (Wis.) 123 (1851), (56 Am. Dec. 164).

II. *Cases holding associations of competing dealers illegal:*

California: Pacific Factor Co. v. Adler, 90 Cal. 110 (1891), (27 Pac. Rep. 36).

Illinois: Craft v. McConoughby, 79 Ill. 346 (1875); *Griffin v. Piper*, 55 Ill. App. 213 (1894).

Iowa: Chapin v. Brown, 83 Iowa, 156 (1891), (48 N. W. Rep. 1074).

Louisiana: India Bagging Association v. Kock, 14 La. Ann. 164 (1849).

New York: People v. Sheldon, 139 N. Y. 251 (1893), (34 N. E. Rep. 785); *People v. Milk Exchange*, 145 N. Y. 267 (1895), (39 N. E. Rep. 1062); *Judd v. Harrington*, 139 N. Y. 105 (1893), (34 N. E. Rep. 790); *Arnot v. Pittston, etc. Coal Co.*, 68 N. Y. 558 (1877), (23 Am. Rep. 190).

In the last case the Court said: “Every producer or vendor of coal or other commodity has the right to use all legitimate efforts to obtain the best price for the article in which he

§ 363. **Associations of Railroad Companies. Traffic Contracts of Connecting Lines.** — A railroad company, upon principles of the common law, may make such contracts and arrangements with companies owning connecting lines, for the interchange of traffic, through rates, and through bills of lading, as it may deem expedient.¹ As a common carrier, it is only bound to carry on its own line, and, in the absence of statutory regulation to the contrary, may, without undue discrimination, select its own agencies for forwarding upon, or receiving freight from, other routes.² Judge Lacombe in *Prescott v. Atchison, etc. R. Co.*³ said: "Now I know of no

deals. But when he endeavors to artificially enhance prices by suppressing or keeping out of the market the products of others, and to accomplish that purpose by means of contracts binding them to withhold their supply, such arrangements are even more mischievous than combinations not to sell under an agreed price. Combinations of that character have been held to be against public policy and illegal."

¹ *United States v. Columbus R. Co. v. Indianapolis R. Co.*, 5 McLean, 450 (1853).

Illinois v. Chicago, etc. R. Co. v. Ayres, 140 Ill. 644 (1892), (30 N. E. Rep. 687).

Minnesota v. Stewart v. Erie, etc. Transp. Co., 17 Minn. 372 (1871).

New York v. Hartford, etc. R. Co. v. New York, etc. R. Co., 3 Rob. 411 (1865).

New Jersey v. Sussex R. Co. v. Morris, etc. R. Co., 19 N. J. Eq. 13 (1868); reversed on other grounds, 20 N. J. Eq. 542 (1869).

Pennsylvania v. Cumberland Valley R. Co. v. Gettysburgh, etc. R. Co., 177 Pa. St. 519 (1896), (35 Atl. Rep. 952).

² In *Atchison, etc. R. Co. v. Denver, etc. R. Co.*, 110 U. S. 680 (1884), (4 Sup. Ct. Rep. 185), Mr. Chief Justice Waite said: "At common law, a carrier is not bound to carry except on his own line, and we think it quite clear that if he contracts to go beyond he may,

in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ. His contract is equivalent to an extension of his line for the purpose of the contract, and if he holds himself out as a carrier beyond the line, so that he may be required to carry in that way for all alike, he may nevertheless confine himself in carrying to the particular route he chooses to use. He puts himself in no worse position, by extending his route with the help of others, than he would occupy if the means of transportation employed were all his own. He certainly may select his own agencies and his own associates for doing his own work."

See also *St. Louis Drayage Co. v. Louisville, etc. R. Co.*, 65 Fed. 39 (1894); *Little Rock, etc. R. Co. v. St. Louis, etc. R. Co.*, 41 Fed. 563 (1890).

In *Eclipse Towboat Co. v. Pontchartrain R. Co.*, 24 La. Ann. 1 (1872), a railroad and steamboat company, forming a through line, agreed to prorate freight from New Orleans to Mobile, and it was held that, as common carriers, in the absence of statutory prohibition, they might agree or refuse to prorate through freight with anybody, and that another steamboat company had no ground of complaint.

³ *Prescott, etc. R. Co. v. Atchison, etc. R. Co.*, 73 Fed. 438 (1896).

principle of common law which forbids an individual railroad corporation, or two or more corporations, from selecting as to which one of two or more corporations they will employ, as auxiliary to their own lines, as the agency by which they will send freight beyond their own lines, or as their agent to receive freight on the auxiliary line to be transmitted to their own line upon through bills and without breaking bulk."

The Interstate Commerce Act¹ and other statutes requiring carriers to furnish equal facilities for the interchange of traffic with connecting lines, and providing that there shall be no discrimination in rates and charges, do not invalidate traffic contracts for the interchange of business and relating to matters purely of mutual accommodation; nor require that such a contract, if made with one connecting carrier, shall be made with all.² If a railroad company afford equal physical facilities for the reception and delivery of freight, and maintain equal rates, it may, without contravening such statutes, discriminate in forwarding through freight, and in paying, or waiving prepayment of, charges, and may enter into traffic contracts for such purposes.³

¹ Par. 2 of § 3 of the Interstate Commerce Act (24 U. S. Stat. at L. 380), provides: "Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines, and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

² *Gulf, etc. R. Co. v. Miami Steamship Co.*, 86 Fed. 407 (1898); *Prescott,*

etc. R. Co. v. Atchison, etc. R. Co., 73 Fed. 438 (1896), (practically *overruling* the decision of the same court in *New York, etc. R. Co. v. New York, etc. R. Co.*, 50 Fed. 867 (1892)); *Little Rock, etc. R. Co. v. St. Louis, etc. R. Co.*, 63 Fed. 775 (1894), *affirming* 59 Fed. 402 (1894); *Kentucky, etc. Bridge Co. v. Louisville, etc. R. Co.*, 37 Fed. 567 (1889). See also *Atchison, etc. R. Co. v. Denver, etc. R. Co.*, 110 U. S. 667 (1884), (4 Sup. Ct. Rep. 185), where the Supreme Court of the United States construed a provision of the Colorado Constitution similar to that of the Interstate Commerce Act above stated.

³ *Southern Indiana Express Co. v. United States Exp. Co.*, 88 Fed. 659 (1898), (*affirmed* 92 Fed. 1022 (1899)): "The furnishing of equal facilities,

The question whether traffic contracts between connecting railroads are of such a character as to operate in restraint of interstate commerce in violation of the federal anti-trust law is considered in another chapter.¹

§ 364. **Associations of Railroad Companies. Traffic Contracts of Competing Lines. Pools.** — Traffic contracts between competing railroad companies for the establishment and maintenance of rates, and, for the restriction of competition, in the absence of statutory prohibitions, are not *necessarily*, although presumptively,² against public policy.³ Such con-

without discrimination, does not require a common carrier to advance money to all other carriers on the same terms, nor to give credit for the carriage of articles of trade and commerce to all carriers because it extends credit for such services to others." Citing *Oregon Short Line, etc. R. Co. v. Northern Pacific R. Co.*, 61 Fed. 158 (1894); *Little Rock, etc. R. Co. v. St. Louis Southwestern R. Co.*, 63 Fed. 775 (1894); *Little Rock, etc. R. Co. v. St. Louis, etc. R. Co.*, 41 Fed. 559 (1890). See also *Gulf, etc. R. Co. v. Miami Steamship Co.*, 86 Fed. 407 (1898).

¹ *Post*, ch. 39: "*Construction and Application of Federal Statute.*"

² *Cleveland, etc. R. Co. v. Closser*, 126 Ind. 348 (1890), (26 N. E. Rep. 159).

³ The argument in favor of permitting competing railroad companies to enter into reasonable traffic contracts is well stated by Judge Blodgett in *Manchester, etc. R. Co. v. Concord R. Co.*, 66 N. H. 127 (1890), (20 Atl. Rep. 383): "The naked question presented then is, whether all contracts between rival railway corporations which prevent competition are necessarily contrary to public policy, and therefore *mala prohibita* and illegal in themselves. To state this question is to answer it in the negative, because it is obvious that the answer depends on circumstances. While, without doubt, contracts which have a direct tendency to prevent a healthy competition are detrimental to

the public and, consequently, against public policy, it is equally free from doubt that when such contracts prevent an unhealthy competition, and yet furnish the public with adequate facilities at fixed and reasonable rates, they are beneficial, and in accord with sound principles of public policy. For the lessons of experience, as well as the deductions of reason, amply demonstrate that the public interest is not subserved by competition, which reduces the rate of transportation below the standard of fair compensation; and the theory which formerly obtained, that the public is benefited by unrestricted competition between railroads, has been so emphatically disproved by the results which have generally followed its adoption in practice, that the hope of any permanent relief from excessive rates through the competition of a parallel or rival road may, as a rule, be justly characterised as illusory and fallacious."

See also *Hare v. London, etc. R. Co.*, 2 Johns. & H. 103 (1861), (30 L. J. Ch. 817, 7 Jur. (N. S.) 1145), where Vice-Chancellor Wood said: "With regard to the argument against the validity of the agreement [a railroad traffic contract], I may clear the ground of one objection by saying that I see nothing in the alleged injury to the public arising from the prevention of competition. . . . It is a mistaken notion that the public is benefited by putting two railway companies against each other till one is ruined, the result being at last to

tracts have often resulted beneficially to the public as well as to the companies. The public interests, in the past, have not always been promoted by ruinous competition, rate-cutting and railroad bankruptcy.

The validity of a traffic contract, in the absence of a controlling statute, depends upon whether its provisions go further than is necessary to prevent unhealthy competition — whether its purpose or necessary or natural effect is to increase rates or diminish facilities. Traffic contracts affecting interstate commerce have, however, been held to come within the prohibition of the federal anti-trust act, the application of which is fully considered elsewhere.¹

The particular class of traffic contracts known as pooling contracts² — for the pooling of earnings or of traffic — have been sustained in England.³ In this country, however, they

raise the fares to the highest possible standard."

The other side is presented in the dissenting opinion of Judge Shiras in *United States v. Trans. Missouri Freight Ass'n*, 58 Fed. 58 (1893), (quoted with approval by the Supreme Court in s. c. 166 U. S. 290 (1896): "I fail to perceive the force of the argument that, because railway companies, through their own action, cause evils to themselves and the public by sudden changes or reductions in tariff rates, they must be permitted to deprive the community of the benefit of competition in securing reasonable rates for the transportation of the products of the country. Competition, free and unrestricted, is the general rule which governs all the ordinary business pursuits and transactions of life. Evils, as well as benefits, result therefrom. In the fierce heat of competition the stronger competitor may crush out the weaker, fluctuations in prices may be caused that result in wreck and disaster; yet balancing the benefits as against the evils, the law of competition remains as a controlling element in the business world. That free and unrestricted competition in the matter of railroad

charges may be productive of evils does not militate against the fact that such is the law now governing the subject. No law can be enacted nor system be devised for the control of human affairs that, in its enforcement, does not produce some evil results, no matter how beneficial its general purpose may be. There are benefits and there are evils which result from the operation of the law of free competition between railway companies. The time may come when the companies will be relieved from the operation of this law, but they cannot, by combination and agreements among themselves, bring about this change.

¹ *Post*, § 392: "*Statute applies to Combinations of Railroads and other Carriers.*"

² For description of "pools" see *ante*, § 308: "*Formation of Associations.*"

³ *Hare v. London, etc. R. Co.*, 2 Johns. & H. 80 (1861), 30 L. J. Ch. 817, 7 Jur. (n. s.) 1145. See also *Shrewsbury, etc. R. Co. v. London, etc. R. Co.*, 17 Q. B. 652 (1857), 2 Macn. & G. 324, 16 Beav. 411, 4 De Gex, M. & G. 116, 6 H. L. Cas. 113.

A pooling contract, amounting, sub-

have, as a rule, been discountenanced.¹ As the effect of such contracts is to restrict competition between *quasi*-public corporations, and to confer a power to increase rates and decrease facilities, they are clearly opposed to the rule of public policy. They are, also, when affecting interstate commerce, expressly prohibited by the Interstate Commerce Act,² and contravene the provisions of the federal anti-trust statute.³

stantially, to an amalgamation without legislative authority, was held invalid by Vice-Chancellor Wood in *Charlton v. Newcastle, etc. R. Co.*, 7 Week. R., 731 (1859), 5 Jur. (N. S.) 1100.

¹ Where, under the statutes governing a railroad company, it is forbidden to discriminate against any connecting or intersecting road or to enter into any combination, in the nature of partnership, with any parallel line, a pooling arrangement made by its receivers with another railroad company which has two hundred miles of parallel road in the State, relating to business interchanged, and giving such road a preference in rates, is illegal; and will be ordered to be abrogated upon objection made by other connecting lines, although the receivers are willing to make the same arrangement with the objecting companies. *Missouri Pac. R. Co. v. Texas, etc. R. Co.*, 30 Fed. 2 (1887).

When a "pooling contract" has been fully executed, and the profits derived therefrom are collected and held by a receiver of one of the companies, he will not be allowed to retain them, but will be decreed to make payment to the other company in accordance with the terms of the contract, without regard to its validity. *Central Trust Co. v. Ohio Cent. R. Co.*, 23 Fed. 306 (1885). See also *Nashua, etc. R. Co. v. Boston, etc. R. Co.*, 19 Fed. 804 (1884). But see *Chicago, etc. R. Co. v. Wabash, etc. R. Co.*, 61 Fed. 998 (1894), where the Court said with reference to a pooling contract: "Courts will not lend their aid to enforce the

performance of a contract which is contrary to public policy or the law of the land, but will leave the parties in the plight their own illegal action has placed them." See also case last cited for general consideration of the legality of pooling contracts.

² The Interstate Commerce Act (24 U. S. Stat. at L. 379) provides as follows: "§ 5. That it shall be unlawful for any common carrier, subject to the provisions of this act, to enter into any contract, agreement or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and, in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offence."

The provisions of this section do not apply to a pooling contract between a railroad company and a pipe line company for the transportation of oil. *Independent Refiners Ass'n v. Western New York, etc. R. Co.*, 4 Int. Com. Rep. 162 (1892). Nor do they invalidate a contract between railroad companies owning parallel lines wherein it is agreed that neither company shall interfere with the other in constructing *new lines*; nor do they invalidate a contract as a whole, but only the pooling provisions in it. *Ives v. Smith*, 55 Hun (N. Y.), 606 (1889), (8 N. Y. Supp. 46), *affirming* 19 N. Y. St. Rep. 556 (1888), (3 N. Y. Supp. 645).

³ *Post*, § 392: "Statute applies to

§ 365. **Associations of Gas Companies and other Quasi-public Corporations.** — The rule of public policy applicable to *quasi*-public corporations necessarily applies to all corporations of that class. An examination of the rule in reference to particular corporations or kinds of corporations, within that class, is valuable only by way of illustration.

Gas companies which have acquired the right to lay their pipes in the public streets are *quasi*-public corporations, and any combination among them, the necessary or natural consequence of the operation of which will be to increase charges beyond reasonable rates or to restrict facilities, is inimical to public policy.¹

Combinations of Railroads and other Carriers."

¹ *Gibbs v. Consolidated Gas Co.*, 130 U. S. 408 (1889), (9 Sup. Ct. Rep. 553): "The supplying of illuminating gas is a business of a public nature to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that may be furnished by individual effort. . . . Hence, while it is justly argued that those rules which say that a given contract is against public policy should not be arbitrarily extended so as to interfere with the freedom of contract, yet, in the instance of business of such character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts, imposing such restraint, however partial, because in contravention of public policy."

People v. Chicago Gas Trust Co., 130 Ill. 293 (1889), (22 N. E. Rep. 798, 17 Am. St. Rep. 319): "The business of manufacturing and distributing illuminating gas by means of pipes laid in the streets of a city is a business of a public character; it is the exercise of a franchise belonging to the State; the services rendered and to be rendered for such a grant, are of a public nature; companies engaged in such business owe a duty to the public; any unreasonable restraint upon the performance of

such duty is prejudicial to the public interest and in contravention of public policy."

See also *Chicago Gas Light, etc. Co. v. People's Gas Light, etc. Co.*, 121 Ill. 530 (1887), (13 N. E. Rep. 169, 2 Am. St. Rep. 124); *State v. Portland Natural Gas, etc. Co.*, 153 Ind. 483 (1899). (53 N. E. Rep. 1089, 74 Am. St. Rep. 314); *San Antonio Gas Co. v. State*, 22 Tex. Civ. App. 118 (1899), (54 S. W. Rep. 289).

Compare these decisions with that in the case of *Rafferty v. Buffalo City Gas Co.*, 37 App. Div. (N. Y.) 622 (1899), (56 N. Y. Supp. 288), where the Court, in holding that one gas company had power to make a contract to purchase stocks and bonds of a competing company, said: "It is further said that the contemplated purchase operates to effect a combination with another company for the creation of a monopoly, or the unlawful restraint of trade, or the prevention of competition in a necessary of life, contrary to the provisions of section 7 of the Stock Corporation Law. A monopoly is not constituted. No exclusive privilege or right as against individuals or corporations to manufacture or sell gas is acquired. Nor, in a more restricted use of the word "monopoly," is that condition brought about by force of this contract. . . . The contract of purchase here involved does not appear on its face to be in unlawful restraint of

All carrier corporations which exercise public franchises are governed, in respect of the right of association, by the same rule. It is immaterial whether they physically carry merchandise, convey messages by means of the electrical current,¹ or maintain a pipe line for the transportation of petroleum.²

trade, nor to prevent lawful competition. The avowed and apparent purpose of it is to prevent *ruinous* competition. . . . A contract made to prevent or avoid destructive competition is not necessarily invalid."

¹ In *Benedict v. Western Union Tel. Co.*, 9 Abb. N. C. (N. Y.) 221 (1881), when two competing telegraph companies entered into an agreement for dividing expenses and earnings, the Court said: "In the absence of any legislation, it might be urged that such arrangements were against public policy as tending to prevent competition; but in view of the legislation which authorizes the consolidation of these corporations, the purchase and sale of their franchises, the joint construction and use of telegraph lines, all of which tend to prevent competition, it cannot be said that any such public policy is countenanced by the legislature of this State."

Compare this language with that of the New York Court of Appeals in the *Sugar Trust Case* (*People v. North River Sugar Ref'g Co.*, 121 N. Y. 582 (1890), (24 N. E. Rep. 834, 18 Am. St. Rep. 843), where it was said, in substance, that a grant of authority to consolidate only countenanced consolidation according to its provisions, and was no indication of public policy in favor of combinations.

An agreement between a telegraph

company and a railroad company, wherein the latter grants to the former the exclusive right to maintain a telegraph line upon its right of way, is against public policy and void. *Baltimore, etc. Tel. Co. v. Western Union Tel. Co.*, 24 Fed. 319 (1884); *Western Union Tel. Co. v. Burlington, etc. R. Co.*, 11 Fed. 1 (1882); *Union Trust Co. v. Atchison, etc. R. Co.*, 8 N. Mex. 327 (1895), (43 Pac. Rep. 701); *Western Union Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160 (1880), (38 Am. Rep. 781). See also *United States v. Union Pacific R. Co.*, 160 U. S. 1 (1895), (16 Sup. Ct. Rep. 190). Compare *Western Union Tel. Co. v. Chicago, etc. R. Co.*, 86 Ill. 246 (1877), (29 Am. Rep. 28).

² *West Virginia Transp. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 625 (1883): "If there be any sort of business, which from its peculiar character can be restrained to no extent whatever without prejudice to the public interest, then the courts would be compelled to hold void any contract imposing any restraint, however *partial*, on this peculiar business; provided, of course, it be clearly shown that the peculiar business thus attempted to be restrained is of such a character, that any restraint upon it, however *partial*, must be regarded by the court as prejudicial to the public interest."

CHAPTER XXXVII

RIGHTS AND REMEDIES.

- § 366. Rights and Remedies of Members of Illegal Combinations. In General.
- § 367. Rights and Remedies between Combination and its Members.
- § 368. Rights of Receivers and Assignees.
- § 369. Collateral Attack upon Combination. Remedies upon Independent Contracts.
- § 370. Rights of Creditors.
- § 371. Rights and Remedies of Stockholders of Combining Corporations.
- § 372. Remedies of State. *Quo Warranto* against Corporate Combination.
- § 373. Remedies of State. *Quo Warranto* against Combining Corporations.
- § 374. Remedies of State. Injunction.
- § 375. Evidence.

§ 366. Rights and Remedies of Members of Illegal Combinations. In General. — The parties to a combination, formed in contravention of a rule of public policy, stand *in pari delicto*, and the law will not aid them in enforcing any rights based upon the unlawful contract.¹ A court of law or equity will take them as it finds them, and as it finds them will leave them, without assistance in any matter growing out of the illegal combination.

¹ *United States*: National Harrow Co. v. Hench, 84 Fed. 226 (1898).

California: Vulcan Powder Co. v. Hercules Powder Co., 96 Cal. 510 (1892), (31 Pac. Rep. 581, 31 Am. St. Rep. 242).

Illinois: Craft v. McConoughy, 79 Ill. 346 (1875), (22 Am. Rep. 171); Foss v. Cummings, 149 Ill. 353 (1894), (36 N. E. Rep. 553). See also American Strawboard Co. v. Peoria Strawboard Co., 65 Ill. App. 502 (1895).

Iowa: Chapin v. Brown, 83 Iowa, 156 (1891), (48 N. W. Rep. 1074).

Kansas: Greer v. Payne, 4 Kan. App. 153 (1896), (46 Pac. Rep. 190).

Louisiana: Texas, etc. R. Co. v. Southern Pac. R. Co., 41 La. Ann. 970 (1889), (6 So. Rep. 888); India Bagging Ass'n v. Kock, 14 La. Ann. 168 (1859).

New York: Judd v. Harrington, 139 N. Y. 105 (1893), (34 N. E. Rep. 790); Pittsburgh Carbon Co. v. McMillan, 119 N. Y. 46 (1890), (23 N. E. Rep. 530); Leonard v. Poole, 114 N. Y. 379 (1889), (21 N. E. Rep. 707); Gray v. Oxnard Bros. Co., 39 Hun, 387 (1891), (13 N. Y. Supp. 86); Clancy v. Onondaga Fine Salt Mfg. Co., 62 Barb. 395 (1862); De Witt Wire Cloth Co. v. New Jersey Wire Cloth Co., 16 Daly, 529 (1891), (14 N. Y. Supp. 277).

Ohio: Emery v. Ohio Candle Co., 47 Ohio St. 320 (1890), (24 N. E. Rep. 660, 21 Am. St. Rep. 819).

Pennsylvania: Nester v. Continental Brewing Co., 161 Pa. St. 473 (1894), (29 Atl. Rep. 102, 41 Am. St. Rep. 894); Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173 (1871).

In the application of the maxim *ex turpi causa non oritur actio*, the test is whether the plaintiff is obliged to rely upon the illegal contract in order to establish his right to relief.¹ If he claims through the medium of an unlawful transaction, he is without standing, for the courts will not assist in adjusting differences growing out of, or requiring the investigation of, illegal transactions, however much they may be disguised.

Upon these principles, a member of an illegal combination cannot maintain an action to recover his share of the profits of the enterprise,² or for an accounting;³ nor can he obtain redress for a fraud committed by another member in carrying out the combination agreement.⁴ He is not only without remedy upon the agreement respecting the combination, but he cannot recover for the breach of *any* contract made in furtherance of its objects.⁵ It follows, also, that a

¹ Greer v. Payne, 4 Kan. App. 162 (1896), (46 Pac. Rep. 190): "The contract of membership is, therefore, illegal and void, and no right can grow out of it. Hence, it comes to this: A court of equity is asked to assist the plaintiffs in carrying out an illegal contract, so that they may enjoy its fruits, and to aid them in maintaining a position as members of an organization, which can be done only by a continual violation of the law. This will not be done. The law will not allow any effect to an illegal contract either by enforcing it or by aiding one to secure benefits accruing from it. *Whenever it is necessary for a plaintiff to establish or rely upon an illegal contract as a basis of his right to relief, the courts will not stop to inquire into the merits of the controversy, but will at once refuse to exercise their jurisdiction in his behalf.*"

See also Nester v. Continental Brewing Co., 161 Pa. St. 473 (1894), (29 Atl. Rep. 102, 41 Am. St. Rep. 894). The Charles E. Wiswall, 86 Fed. 671 (1898).

² Emery v. Ohio Candle Co., 47 Ohio St. 320 (1890), (24 N. E. Rep. 660, 21 Am. St. Rep. 849); Foss v. Cummings, 149 Ill. 353 (1894), (36 N. E. Rep. 553); Gray v. Oxnard Bros. Co. 59 Hun (N. Y.),

387 (1891), (13 N. Y. Supp. 86). See also Meyers v. Merillion, 118 Cal. 352 (1897), (50 Pac. Rep. 662).

³ Nester v. Continental Brewing Co., 161 Pa. St. 473 (1894), (29 Atl. Rep. 102, 41 Am. St. Rep. 894); Leonard v. Poole, 114 N. Y. 379 (1889), (21 N. E. Rep. 707).

⁴ Leonard v. Poole, 114 N. Y. 379 (1889), (21 N. E. Rep. 707): "The relief sought would require the court to investigate all of the various transactions of these parties, from the beginning to the end of their unlawful enterprise, and adjust the differences between them. This is precisely what courts have always refused to do. The fraud which the trial court found was practised by these defendants upon their associate cannot be too strongly condemned, but courts are not organized to enforce the saying that there is honor among law-breakers, and the desire to punish must not lead to a decision establishing the doctrine that law-breakers are entitled to the aid of courts to adjust differences arising out of, and requiring an investigation of, their illegal transactions."

⁵ Where a contract for the sale of

court of equity will afford him no relief, by injunction or otherwise, for the enforcement or protection of his rights as a member of an unlawful combination.¹

§ 367. **Rights and Remedies between Combination and its Members.** — An agreement for a combination contrary to public policy is invalid; the resultant organization — association, trust or corporate combination — is unlawful. Courts of law or equity will not lend such a combination aid in the enforcement of the invalid agreement or in any matter adhering thereto. If the contracts between the combination and its members are executory, a court will not enforce them in favor of or against the combination; if fully executed, a court will not attempt to rescind them at the suit of either party, or grant other relief.² Both the combination and its members will be left where they have placed themselves. Thus, a corporate combination cannot maintain an action of replevin for property purchased in the formation of the combination but which has remained in the possession of the vendor;³ nor sue for a receiver and an accounting when a

grain bags provided that the purchaser should have the exclusive right to sell such bags up to a prescribed number and for the sale of a lesser number *pro rata*, and such contract was a part of a scheme to gain a monopoly, it was held that the contract was void and that there could be no recovery for a breach thereof.

Pacific Factor Co. v. Adler, 90 Cal. 110 (1891), (27 Pac. Rep. 36). See also *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173 (1871); *Beechley v. Mulville*, 102 Iowa, 602 (1897), (70 N. W. Rep. 107, 63 Am. St. Rep. 479).

¹ *Greer v. Payne*, 4 Kan. App. 153 (1896), (46 Pac. Rep. 190). See also next section.

² *Queen Ins. Co. v. State*, 86 Tex. 250 (1893), (24 S. W. Rep. 397).

See also *Richardson v. Buhl*, 77 Mich. 661 (1889), (43 N. W. Rep. 1102), where the Court (*per* Champlin, J.) said: "It is also well settled that, if a contract be void as against public policy, the court will neither enforce it while executory, nor relieve a party from

loss by having performed it in part." Citing *Foot v. Emerson*, 10 Vt. 344 (1838); *Hanson v. Power*, 8 Dana (Ky.) 91 (1839); *Pratt v. Adams*, 7 Paige (N. Y.) 616 (1839); *Piatt v. Oliver*, 1 McLean (U. S.) 294 (1837); 2 McLean (U. S.) 277 (1840); *Stanton v. Allen*, 5 Denio (N. Y.) 434 (1848), (49 Am. Dec. 282). In *Hutchins v. Weldon*, 114 Ind. 89 (1887), (15 N. E. Rep. 804), the Supreme Court of Indiana said: "The law in such case will leave the parties just where it finds them. If the contract has not been executed, the law will not extend relief. When a contract, void as against sound morals or public policy, has been fully executed by both parties and suit brought under, upon or against such contract, *potior est conditio defendentis*."

³ *Bishop v. American Preservers Co.*, 157 Ill. 316 (1895), (41 N. E. Rep. 765): "In the case at bar, the appellant never parted with the possession of the property. After he executed the bill of sale, he still continued his business the

member withdraws.¹ Nor will a bill for an injunction lie to prevent a member from doing business contrary to the provisions of the combination agreement, even though it retain the consideration paid.²

It has, however, been held that a member, seeking to withdraw from an illegal combination and returning the consideration paid, is entitled to an injunction restraining the combination from taking possession of its property, and to a decree declaring the combination agreement void.³

An agreement contrary to a rule of public policy, in its

same as before, though subject to the orders and direction of the trust. The beginning of the action of replevin admits his possession, as replevin does not lie against one not in possession. *Wells on Replevin*, 77; *Hall v. White*, 106 Mass. 599 (1871). We see no reason why the doctrine of the *Kirkpatrick Case* does not apply here, although the action is replevin and not ejectment, and although the property involved is personalty and not real estate. The bill of sale rests under the ban of the law, as well when executed to carry out the illegal agreement hereinbefore set forth, as if it had been made for the purpose of defrauding creditors. The law will not aid the appellee to recover the property, but will leave both it and appellant where they were when the suit was begun."

¹ *American Biscuit, etc. Co. v. Klotz*, 44 Fed. 721 (1891).

² *American Preservers Trust v. Taylor Mfg. Co.*, 46 Fed. 152 (1891): "The ultimate question is whether the covenant to discontinue one branch of its business, made under the circumstances and for the considerations disclosed by the bill, can be enforced in equity against the defendant corporation. An injunction as prayed for, if granted, will operate, of course, as a specific enforcement of the covenant; and the general rule is that agreements will not be specifically enforced that are inequitable, or tainted with illegality, or that are in excess of corporate powers. . . .

In view of the unlawful character of the transaction out of which the covenant arises, I conclude that a court of equity would not be warranted in enforcing it by injunction, even though the defendant company has received, and still retains, a portion of the consideration which induced it to execute the covenant."

³ *Merz Capsule Co. v. United States Capsule Co.*, 67 Fed. 414 (1895): "It remains to be considered what relief should be administered upon this state of things. The proof sufficiently shows—and, indeed, the nature of the transaction sufficiently demonstrated this—that the complainant on its own account is not entitled to claim any relief founded upon the contract; but the contract itself being contrary to law, furnishes no support for the aggressive attitude and conduct of the defendants. The complainant's conduct has been disingenuous, but I think it has the law of the case. The result is, as it seems to me, that the parties stand, in respect of their property rights, upon the same footing as if the contract had never been made; and, upon the restoration by the complainant of what it has received upon the footing of the contract, it would seem that the complainant is entitled to preventive relief, and that the defendants, or such of them as threaten to invade the property of the complainant, should be restrained from interfering therewith."

effect upon the rights of the parties, must be distinguished from an *ultra vires* agreement. Property delivered to a combination which is, in its formation, merely beyond the powers of the corporations composing it, may be recovered back;¹ while no relief will be granted to a party to an agreement inimical to public policy. The distinction is between invalidity and unlawfulness.

§ 368. **Rights of Receivers and Assignees.** — As a general rule, a receiver takes the title of the corporation which he represents, and any defences which would have been good against it are good against him. Thus, a receiver appointed in proceedings to forfeit the charter of a corporation on account of its participation in an illegal combination, cannot maintain an action against another member of the combination to recover a share of the profits accruing from the unlawful enterprise.² Upon similar principles, an assignee of a party to an illegal combination stands in the shoes of his assignor and takes the assigned claim subject to all disabilities attaching to it.³

An exception to the general rule that defences good against a corporation are available against its receiver exists where the corporation is insolvent. Thus, the receiver of an insolvent corporate combination may collect debts due it, and apply them in satisfaction of the claims of creditors, even though the defence of illegality might have been available if the action had been brought by the combination.⁴ It is

¹ *Mallory v. Hanaur Oil Works*, 86 Tenn. 598 (1888), (8 S. W. Rep. 396). In this case five companies engaged in the manufacture of cotton seed oil, formed a trust and turned over their mills to an executive committee, and they were operated by such committee. One of the corporations voted to withdraw, and brought an action of unlawful detainer for the recovery of its property. The trust agreement was held invalid as involving an *ultra vires* partnership of corporations and the plaintiff was allowed a recovery. No question appears to have been raised as

to the legality of the combination upon considerations of public policy.

² *Gray v. Oxnard Bros. Co.*, 59 Hun (N. Y.), 387 (1891), (13 N. Y. Supp. 86).

³ *Nester v. Continental Brewing Co.*, 161 Pa. St. 473 (1894), (29 Atl. Rep. 102, 41 Am. St. Rep. 894).

⁴ *Pittsburgh Carbon Co. v. McMullan*, 119 N. Y. 46 (1890), (23 N. E. Rep. 530): "The general rule is well established that a receiver takes the title of the corporation or individual whose receiver he is, and that any defence which would have been good against the former may be asserted against the latter.

manifest, however, that this exception applies only to collateral agreements. A receiver, even of an insolvent corporation, could not maintain an action *based upon* an unlawful contract.

§ 369. **Collateral Attack upon Combination. Remedies upon Independent Contracts.** — The due and regular administration of justice requires that the validity of combinations, — trusts, corporate combinations or associations, — according to the rules of public policy, should be determined in direct proceedings instituted for the purpose; or in actions based upon, or growing out of, the alleged illegal contract. The mere fact that the general object of a corporation is opposed to public policy — that it constitutes an unlawful combination — does not serve *ipso facto* to create a default upon its obligations nor to deprive it of standing to protect its rights; and such fact cannot be invoked collaterally to affect in any manner its *independent* rights or obligations.¹

But there is a recognized exception which permits a receiver of an insolvent individual or corporation, in the interest of creditors, to disaffirm dealings of the debtor in fraud of their rights. Assuming that the trustee could not have recovered of the debtor for the reason suggested, it would be a very strange application of the doctrine that no right of action can spring from an illegal transaction, which should deny to innocent creditors of the combination, or to the receiver who represents them, the right to have the debt collected and applied in satisfaction of their claim. The just rule of the common law, that courts will not lend their aid to enforce illegal transactions at the instance of a party to the illegality, would be misapplied if permitted to be used to prevent the application of the fund in question to the payment of creditors of the combination."

See also *American Handle Co. v. Standard Handle Co.* (Tenn. 1900), 59 S. W. Rep. 709 (1900).

¹ *Dennehy v. McNulta*, 86 Fed. 825 (1898); *Lafayette Bridge Co. v. City of*

Streator, 105 Fed. 731 (1900); *Olmstead v. Distilling, etc. Co.*, 73 Fed. 49 (1895).

In *Liverpool, etc. Ins. Co. v. Clunie*, 88 Fed. 169 (1898), the Court said: "It is further objected by the defendant that the complainants should not be allowed to come into a court of equity for relief; and, in support of this objection, he invokes the maxim that he who comes into a court of equity must do so with clean hands. The inequitable conduct charged against the complainants is that they are members of an illegal combination and compact known and designated by the name of the "Board of Fire Underwriters of the Pacific;" that the main purpose of this association is to prevent and suppress competition in the insurance business of this State, to control the fixing of premium rates to be charged on insurance, to regulate and prevent rebates, to fix compensation for insurance, to regulate premium collections, and to appoint agencies; that seven-eighths of the insurance companies authorized to transact business in the

The rule for determining the independent character of a demand is the converse of that already considered, and is clearly stated by Judge Lacombe in the case of *The Charles E. Wiswall*:¹ "The test, whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires the aid of the illegal transaction to establish his case. If he cannot open his case, without showing that he has broken the law, a court will not assist him. But if he does not claim through the medium of the illegal transaction, but upon a new contract bottomed on an independent consideration, he may recover."²

The sale of goods by a combination to a purchaser, in the course of its business, is not connected with the illegal character of the combination, but is based upon an essentially different consideration. It is an independent contract, and the purchaser cannot avoid his contract obligation by setting up the invalidity of the plaintiff combination.³ Upon simi-

State are members of this confederation. . . . It will not be necessary to enter into a discussion of the facts thus presented for the purpose of determining the legality of the Board of Underwriters in this action, or to ascertain how far its acts are opened to just criticism. It is manifest that, if such a controversy is disclosed, it is foreign to the one now before the court. The maxim that he who comes into equity must come with clean hands has its limitations. It does not apply to every unconscientious or inequitable conduct on the part of the complainants. The inequity which deprives a suitor of a right to justice in a court of equity is not general iniquitous conduct unconnected with the act of the defendant which the complaining party states as his ground or cause of action, but it must be evil practice or wrong conduct in the particular matter or transaction in respect to which judicial protection or redress is sought."

See also *National Distilling Co. v. Cream City Importing Co.*, 86 Wis. 356 (1893), (56 N. W. Rep. 864); *Anheuser-Busch Brewing Ass'n v. Houck* (Tex.

1894), 27 S. W. Rep. 692; *Arnot v. Pittston, etc. Coal Co.*, 68 N. Y. 558 (1877).

¹ *The Charles E. Wiswall*, 86 Fed. 674 (1898).

² Citing *Swan v. Scott*, 11 Serg. & R. 155 (1824); *Armstrong v. Toler*, 11 Wheat. (U. S.) 258 (1826); *McBlair v. Gibbes*, 17 How. (U. S.) 236 (1854).

³ In the very recent case of *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 545 (1902), the Supreme Court of the United States said: "Assuming, as defendants contend, that the alleged combination was illegal if tested by the principles of the common law, still it would not follow that they could, at common law, refuse to pay for pipe bought by them under special contracts with the plaintiff. The illegality of such combination did not prevent the plaintiff corporation from selling pipe that it obtained from its constituent companies, or either of them. It could pass title by a sale to any one desiring to buy, and the buyer could not justify a refusal to pay for what he bought and received by proving that the seller had previously, in the prosecution of its business, entered

lar principles, an insurance company cannot escape responsibility upon its contract of insurance by alleging that the plaintiff has joined an unlawful combination;¹ and infringers of patents cannot evade liability for their own wrongs by pleading that the plaintiff has entered into a combination to control the market for the patented article.²

into an illegal combination with others in reference generally to the sale of Akron pipe. . . . (p. 549). This is not an action to enforce, or which involves the enforcement of the alleged arrangement or combination between the plaintiff corporation and other corporations, firms and companies in relation to the sale of Akron pipe. As already suggested, the plaintiff, even if part of a combination illegal at common law, was not, for that reason, forbidden to sell property it acquired or held for sale. The purchases by the defendants had no necessary or direct connection with the alleged illegal combination; for the contracts between the defendants and the plaintiff could have been proven without any reference to the arrangement whereby the latter became an illegal combination. If, according to the principles of common law, the Union Sewer Pipe Company could not have sold or passed title to any pipe it received and held for sale, because of an illegal arrangement previously made with other corporations, firms or companies, a different question would be presented. But we are aware of no decision to the effect that a sale similar to that made by the present plaintiff to the defendants respectively would, in itself, be illegal and void under the principles of the common law."

And in *National Distilling Co. v. Cream City Importing Co.*, 86 Wis. 356 (1893), (56 N. W. Rep. 864), the Supreme Court of Wisconsin said: "The argument, if any the case admits of, is that, as the plaintiff was a member or the so-called 'trust' or 'combination,' the defendant might voluntarily purchase the goods in question of it at an agreed price, and con-

vert them to its own use, and be justified in a court of justice in its refusal to pay the plaintiff for them, because of the connection of the vendor with such trust or combination. The plaintiff's cause of action is, in no legal sense, dependent upon or affected by the alleged illegality of the trust or combination, because the illegality, if any, is entirely collateral to the transaction in question, and the court is not called upon, in this action, to enforce any contract tainted with illegality, or contrary to public policy. The mere fact that the plaintiff is a member of a trust or combination, created with the intent and for the purposes set forth in the answer, will not disable or prevent it at law from selling goods, and recovering their price or value."

See also *Wiley v. National Wall Paper Co.*, 70 Ill. App. 543 (1896).

¹ *Springfield Fire, etc. Ins. Co. v. Cannon* (Tex. Civ. App. 1898), 46 S. W. Rep. 376: "The evidence in the case hardly raises the question, but we are of the opinion that, even if it did, it would not prevent the owner of the bagging from insuring it, although he may have been a member of a trust with respect to controlling the prices of bagging in the State of Texas."

² *National Folding Box, etc. Co. v. Robertson*, 99 Fed. 985 (1900); *Bonsack Mach. Co. v. Smith*, 70 Fed. 383 (1895); *American Soda Fountain Co. v. Green*, 69 Fed. 333 (1895); *Edison Electric Light Co. v. Sawyer-Man Electric Co.*, 53 Fed. 592 (1892); *Strait v. National Harrow Co.*, 51 Fed. 819 (1892); *Columbia Wire Co. v. Freeman Wire Co.*, 71 Fed. 306 (1895); *Contra, National Harrow Co. v. Quick*, 67 Fed. 130 (1895).

The principles stated in this section are, however, materially modified in the anti-trust statutes of many States, which expressly provide that the illegality of a combination may be pleaded as a defence to suits upon its independent contracts.¹

§ 370. *Rights of Creditors.* — The legality of a combination cannot be made the subject of collateral attack in enforcing its independent demands. *A fortiori*, the combination cannot, itself, set up its illegality as a defence to demands against it. It cannot take advantage of its own wrong-doing.

That a combination is unlawful, tested by the rule of public policy, is no defence to actions by its creditors.²

The fact that the creditor knew the character of the combination when the debt was incurred, does not affect his right to recover, unless he in some way participated in the illegal project. In *Arnot v. Pittston, etc. Coal Co.*,³ the Court of Appeals of New York said: "He had a right to dispose of his own goods, and (under certain limitations) a vendor of goods may recover for their price, notwithstanding that he knows that the vendee intends an improper use of them, so long as he does nothing to aid in such improper use, or in the illegal place of the purchaser. This doctrine is established by authority, and is sufficiently liberal to vendors. But—and this is a very important distinction—if the vendor does anything beyond making the sale, to aid the illegal scheme of the vendee, he renders himself *particeps criminis*, and cannot recover for the price."

An agreement for the sale of all its products, entered into by a manufacturing company, in good faith, and in ignorance of any ulterior purpose on the part of the purchaser, is not rendered unenforceable by the fact that the latter has made similar contracts with other manufacturers—each in igno-

¹ See *post*, ch. 43: "*Rights, Remedies, and Procedure under State Anti-trust Statutes.*"

² *Globe Tobacco Warehouse Co. v. Leach*, 19 Ky. L. Rep. 1287 (1897), (43 S. W. Rep. 423); *Pittsburgh Carbon Co. v. McMillan*, 119 N. Y. 46 (1890),

(23 N. E. Rep. 520); *Arnot v. Pittston, etc. Coal Co.*, 68 N. Y. 558 (1877), (23 Am. Rep. 190); *Catskill Bank v. Gray*, 14 Barb. (N. Y.) 479 (1851).

³ *Arnot v. Pittston, etc. Coal Co.*, 68 N. Y. 558 (1877), (23 Am. Rep. 190).

rance of the other—for the purpose of controlling the market for the commodity.¹

§ 371. **Rights and Remedies of Stockholders of Combining Corporations.**—An unlawful act is an *ultra vires* act. A corporation has no legal power to enter a combination against public policy. Equity will enjoin the formation or continued operation of an illegal combination, at the instance of any stockholder of a constituent corporation² who has not participated in the illegal scheme and who acts with diligence.³

¹ In *Carter-Crume Co. v. Peurrung*, 86 Fed. 439 (1898), Judge Lurton said: "Another question might arise if all or a large proportion of all the producers of a particular article should agree to sell their entire product to one buyer, who would thereby be enabled to monopolize the market. But if each independent producer contract to sell his product or to sell or lease his plant, without concert with others, or knowledge of or purpose to participate in the plans of the buyer, he cannot be said to have conspired against freedom of commerce, or to have made a contract in illegal restraint of trade. . . . The proof must show that the illegal purpose was mutual."

² In *Stewart v. Erie, etc. Transp. Co.*, 17 Minn. 395 (1871), the Supreme Court of Minnesota said: "We agree with the plaintiff's counsel, and with the cases by him cited, that it is against the general policy of the law to destroy or interfere with free competition. . . . An unauthorized monopoly is, therefore, against public policy as destroying or interfering with free competition. . . . (p. 398). If a corporation is employing its statutory powers, funds, etc. for purposes not within the scope of its institution, a court of equity will, upon the application of a single dissentient stockholder, interfere by injunction. . . . The right of a stockholder to this interference seems to be placed upon the ground that, from the fact that the corporation was created for certain purposes there is an implied contract that it shall not divert its powers or funds to other

purposes, and that such diversion would be a species of breach of trust . . . as well as a violation of law which might endanger the existence of its charter. But it is to a dissentient stockholder that the relief is granted, and to a stockholder who comes with diligence to assert his rights."

See also *Harding v. American Glucose Co.*, 182 Ill. 551 (1899), (55 N. E. Rep. 577, 74 Am. St. Rep. 189); *Leslie v. Lorillard*, 110 N. Y. 519 (1888), (18 N. E. Rep. 363); *Central R. Co. v. Collins*, 40 Ga. 582 (1869). See also *ante*, § 46: "*Rights and Remedies of Dissenting Stockholders*" (consolidation); *ante*, § 114: "*Remedies of Dissenting Stockholders in Case of Invalid or Unfair Sales*"; *ante*, § 151: "*Rights and Remedies of Dissenting Stockholders*" (sales of railroads); *ante*, § 191: "*Remedies of Dissenting Stockholders*" (leases); *ante*, § 293: "*Remedies in Case of Ultra Vires Stockholding*."

³ *Levin v. Chicago Gas Light, etc. Co.*, 64 Ill. App. 400 (1896): "He alleges that he acquired the certificate without knowledge that the same was tainted with any conspiracy or combination; but that is not enough. . . . Every inference deducible from his bill is, that he not only knew of, but participated in, all that he complained of. One who has participated in illegal acts and conspiracies, and partaken of the fruits thereof, may not tear down the structure he has helped to rear simply because he did not know that he had been engaged in illegality and conspiracy. . . . (p. 402). To

It has been contended that the illegality of a corporate combination is the illegality of *that* corporation; that stockholders of a vendor corporation can maintain a bill for an injunction only when their pecuniary interests are affected, and not for the protection of the general public, and, consequently, that they are without standing to complain of the unlawful character of the purchasing corporation. The defect of the argument is in its assumptions. The pecuniary interests of a stockholder of a vendor corporation *are* affected by a transfer of its property to an illegal combination. The combination, if carried out, may lead to a forfeiture of the charter of the vendor corporation, and consequent loss of the stockholder's shares. Moreover, the pecuniary *status* of a stockholder is changed by the transfer of the property and business of his corporation to another corporation, although he may receive his share of the proceeds. He has the right to object to such a change in the form of his investment, especially where the proceeds of the sale are tainted with the illegality of the combination.¹

entitle stockholders to the summary interference of a court, they must apply so recently after the doing of the acts complained of that the court may stop or undo the wrong to them without doing equal or greater wrong to some other person; or, in other words, if a stockholder wants protection against the consequences of an *ultra vires* act, he must ask for it with sufficient promptness to enable the court to do justice to him without doing injustice to others."

See also *Coquard v. National Linseed Oil Co.*, 171 Ill. 480 (1898), (49 N. E. Rep. 563); *Stewart v. Erie, etc. Transp. Co.*, 17 Minn. 395 (1871). See also *ante*, § 49: "*Laches of Stockholders*" (consolidation); *ante*, § 116: "*Defences to Stockholders' Actions. Estoppel*" (sales); § 192: "*Acquiescence and Laches of Stockholders*" (leases).

¹ In *Harding v. American Glucose Co.* 182 Ill. 625 (1899), (55 N. E. Rep. 577, 74 Am. St. Rep. 189), the Supreme Court of Illinois said: "The position of

counsel is that a stockholder can only file a bill to prevent the corporation from disposing of its properties, upon the ground that it will affect his pecuniary interests and because of the necessity of protecting his property rights and because of the necessity of protecting himself from pecuniary loss or injury; and that a stockholder in a vendor corporation has no right to enjoin a sale and transfer of a factory, owned by such vendor, upon the ground that the vendee corporation proposes to create a monopoly. . . . It is idle to say that a stockholder in a corporation would suffer no injury from a forfeiture of its charter rights and from its dissolution. In such a case, the corporation being destroyed, his stock therein would be completely wiped out and be made of no effect. The stockholder has a right to protest against such use of its property by the managing officers of a corporation as will lead to such forfeiture and dissolution. . . . (p. 628). What was there attempted was an abandonment of

A stockholder may maintain a bill in his own name against the corporation and its officers, whenever it is reasonably certain that demand upon the officers to bring the suit in the name of the corporation would be unavailing.¹

Foreign corporations are subject to the same rules of public policy, within the State, as domestic companies. A court of equity will grant relief, touching property within the State, to a stockholder of a foreign corporation which is participating in an unlawful combination.²

the business and sale of the assets without legal termination or dissolution of the company. It makes no difference that the stockholder is to be allowed to receive his proportionate share of the proceeds of the sale of the property. He has a right to hold his investment in the form of stock, and a change of such investment against his consent is a change which affects his pecuniary or financial interests. He has the right to be the judge whether such change in his pecuniary status shall be made or whether he shall continue his investment in the form of stock."

¹ In *Harding v. American Glucose Co.*, 182 Ill. 628 (1899), (55 N. E. Rep. 577, 74 Am. St. Rep. 189), the Court further said: "The bill in this case recites that the complainants therein filed it, not only in their own behalf, but in behalf of all other stockholders, who might see fit to come into the suit and join therein. Where the officers of a corporation wrongfully deal with its property to the injury of the stockholders, the latter may maintain a bill against the company and its officers for relief against such misappropriations. Originally, the rule was that such a suit should be brought by the corporation itself; but equity permits a stockholder, either individually or in behalf of other stockholders similarly situated, to bring such a suit, where the corporation itself either refuses to do so, or where the facts show that the wrong-doing defendants constitute a majority of the managing body, or where it is reasonably certain that a

demand made upon the proper officers of the corporation to bring the action would be unavailing."

See also *ante*, § 48: "*Procedure in Stockholders' Actions*" (consolidation); *ante*, § 115: "*Procedure in Stockholders' Actions*" (sales).

² In *Harding v. American Glucose Co.*, 182 Ill. 635 (1899), (55 N. E. Rep. 577, 74 Am. St. Rep. 189), the Court also said: "It is the settled doctrine of this State, established by many decisions of this court, that foreign corporations do not come into this State as a matter of legal right, but only by comity, and that said corporations are subject to the same restrictions and duties as corporations formed in this State, and have no other or greater powers. . . . Foreign corporations cannot be permitted to come into this State for the purpose of asserting rights in contravention of our laws. . . . Citizens of Illinois cannot evade the laws of Illinois passed against trusts and combines by going into a foreign State and chartering a corporation to do business in this State in violation of its laws. When these foreign corporations come into this State they must conform to the laws and policy of this State. . . . If real estate in Illinois, owned by domestic corporations, cannot be used for the purpose of carrying out the business of an illegal trust or combination, real estate in Illinois, owned by a foreign corporation, cannot be used for such a purpose."

Compare *Small v. Minneapolis, etc. Co.*, 57 Hun (N. Y.), 587 (1890), (10 N.

§ 372. Remedies of State. Quo Warranto against Corporate Combination. — The scope of the remedy of *quo warranto* — applied to corporations — is the forfeiture of the franchises of a corporation for non-user or misuser. The object of the writ is the protection of the public and not the redress of private wrongs. In order to secure a judgment of ouster, misuser must be shown working or threatening injury to the public, or violating fundamental conditions attached to the grant of the franchise.¹

The formation of a combination of competing corporations by means of a holding or purchasing corporation, in violation of a rule of public policy, constitutes a misuser of the franchises of the latter corporation — the corporate combination — and subjects them to forfeiture in *quo warranto* proceedings.² The combination is injurious to public welfare because it is inimical to public policy. If involving quasi-public corporations it breaks the primary contract with the State.

The fact that a corporation, under its charter, has power

Y. Supp. 456), where an injunction was refused in a stockholder's suit because both corporations — vendor and purchaser — were foreign corporations.

¹ State v. Minnesota Thresher Mfg. Co., 40 Minn. 213 (1889), (41 N. W. Rep. 1020).

In People v. North River Sugar Ref'g Co., 121 N. Y. 608 (1889), (24 N. E. Rep. 834, 18 Am. St. Rep. 843), Judge Finch said: "The judgment sought against the defendant is one of corporate death. The State which created asks us to destroy, and the penalty invoked represents the extreme rigor of the law. Its infliction must rest upon just cause and be warranted by material misconduct. The life of a corporation is, indeed, less than that of the humblest citizen, and yet it envelops great accumulations of property, moves and carries in large volume the business and enterprise of the people, and may not be destroyed without clear and abundant reason. . . . It appears to be settled that the State, as prosecu-

tor, must show on the part of the corporation accused some sin against the law of its being which has produced, or tends to produce, injury to the public. The transgression must not be merely formal or incidental but material and serious, and such as to harm the public welfare; for the State does not concern itself with the quarrels of private litigants."

² Distilling, etc. Co. v. People, 156 Ill. 448 (1895), (41 N. E. Rep. 188, 47 Am. St. Rep. 200); People v. Chicago Gas Trust Co., 130 Ill. 268 (1889), (22 N. E. Rep. 798, 17 Am. St. Rep. 319). Also People v. Chicago Live Stock Exch., 170 Ill. 556 (1897), (48 N. E. Rep. 1062, 62 Am. St. Rep. 404); Coquard v. National Linseed Oil Co., 171 Ill. 480 (1898), (49 N. E. Rep. 563); People v. Milk Exch., 145 N. Y. 267 (1898), (39 N. E. Rep. 1062, 45 Am. St. Rep. 609); Stockton v. American Tobacco Co., 55 N. J. Eq. 52 (1897), (36 Atl. Rep. 971).

to purchase and hold property necessary for its business, does not authorize it to acquire competing plants in order to obtain control of the market for a commodity, contrary to the rule of public policy. In *Distilling, etc. Co. v. People*,¹ the Supreme Court of Illinois said: "The defendant is authorized to own such property as is necessary for carrying on its distillery business and no more. Its power to acquire and hold property is limited to that purpose, and it has no power by its charter to enter upon a scheme of getting into its hands, and under its control, all, or substantially all, the distilling plants and the distillery business of the country, for the purpose of controlling production and prices, of crushing out competition and of establishing a virtual monopoly in that business. Such purposes are foreign to the powers granted by the charter. Acquisitions of property to such extent and for such purpose, do not come within the authority to own the property necessary for the purpose of carrying on a general distillery business. In acquiring distillery properties, in the manner and for the purposes shown by the information, the defendant has not only misused and abused the powers granted by its charter, but has usurped and exercised powers not conferred by, but which are wholly foreign to, that instrument. It has thus rendered itself liable to prosecution by the State by *quo warranto*."

A stockholder is without authority to institute proceedings to forfeit the franchises of a corporation, upon the ground that it constitutes an unlawful combination. The remedy of *quo warranto* can only be enforced by the State.²

§ 373. Remedies of State. Quo Warranto against Combining Corporations. — Upon the principles considered in the last section, a corporation which becomes a member of an illegal

¹ *Distilling, etc. Co. v. People*, 156 Ill. 448 (1895), (41 N. E. Rep. 188, 47 Am. St. Rep. 200).

² *Coquard v. National Linseed Oil Co.*, 171 Ill. 484 (1898), (49 N. E. Rep. 563): "The facts pleaded are insufficient to show the existence of a trust, but if they met the requirements in that regard, yet, so far as the public right is

concerned which is the subject of so much argument, that fact would not authorize the filing of the bill by the complainant for the forfeiture of the charter. Only the State can complain of injury to the public, or that public rights are being interfered with, and enforce a forfeiture of defendant's franchise for that reason."

association, or participates in the formation of an unlawful trust or corporate combination, is guilty of a misuser of its franchises, and they are subject to forfeiture in proceedings in *quo warranto* instituted by the State.¹

A private corporation in entering such a combination exceeds its powers in a manner prejudicial to the public interest; a *quasi*-public corporation, fails in the discharge of its public obligations and transgresses the law of its creation.²

¹ *California*. *Havemeyer v. Superior Court*, 84 Cal. 378 (1890), (24 Pac. Rep. 121, 18 Am. St. Rep. 192, 10 L. R. A. 641): "The doctrine is that corporate charters are granted upon the implied condition that the privileges conferred will be used for the advantage, or at least not to the disadvantage, of the State. If this condition is broken, the charter which the State has given is taken back by the State."

See also *People v. American Sugar Ref'g Co.* (Super. Ct. San Francisco, 1890), 7 Ry. & Corp. L. J. 83.

Indiana. *State v. Portland Natural Gas, etc. Co.*, 153 Ind. 483 (1899), (53 N. E. Rep. 1089, 74 Am. St. Rep. 314).

Nebraska. *State v. Nebraska Distilling Co.*, 29 Neb. 719 (1890), (46 N. W. Rep. 155): "The findings in this case, to which no objections are made, clearly show that the object of the distilling company, in entering into the illegal combination, was to destroy competition and create a monopoly not only by limiting the production of alcohol, but, by dismantling as many distilleries as the trust saw fit, absolutely prevent the manufacture of the article except in the few establishments controlled by the trust, and thus it would be enabled to control prices, prevent production and create a monopoly of the most offensive character. Any contract entered into with such an object in view is, under the laws of this State, null and void, and the conveyance from the distilling company to the trust was in contravention of the authority conferred by the statute on that com-

pany, in excess of the powers granted by its charter and against public policy and void, and no title passed by such conveyance. . . . As there has been an abuse of the corporate franchise, it will be dissolved and annulled."

In this case it was also held that a transfer of property pending *quo warranto* proceedings would not serve to evade the effect of the judgment.

New York. *People v. North River Sugar Ref'g Co.*, 121 N. Y. 582 (1889), (24 N. E. Rep. 834, 18 Am. St. Rep. 843).

Ohio. *State v. Standard Oil Co.*, 49 Ohio St. 137 (1892), (30 N. E. Rep. 279, 34 Am. St. Rep. 541, 15 L. R. A. 145).

Texas. *San Antonio Gas Co. v. State*, 22 Tex. Civ. App. 118 (1899), (54 S. W. Rep. 118), (with especial reference to the Texas anti-trust statute).

² In *State v. Portland Natural Gas, etc. Co.*, 153 Ind. 491 (1899), (53 N. E. Rep. 1089, 74 Am. St. Rep. 314), the Supreme Court of Indiana said: "While appellee, by the agreement in controversy, cannot be said to have fully renounced autonomy, still it did so to the extent, at least, that it thereby disabled itself from supplying persons with gas who were patrons of the other company. By entering into this agreement, and carrying it into execution, appellee violated the principles of public policy, and clearly abused the rights and powers conferred upon it by the State, and may be said to have offended against the laws of its creation. Such an illegal act or agreement, upon the part of a corporation like appellee,

Upon proof in *quo warranto* proceedings that a defendant corporation has entered into an illegal agreement for a combination, the courts may declare a forfeiture of its corporate franchise ; or, it is held, may render a judgment of ouster from the right to make or carry out the combination agreement.¹

§ 374. Remedies of State. Injunction. — The State may file a bill for an injunction to restrain any *ultra vires* act of a corporation of a nature to produce public injury. It may enjoin the formation of an unlawful combination — association, trust or corporate combination. It is not obliged to wait until the organization has been completed, and all the injury possible is in process of infliction.²

cannot be permitted to override the law, and it was the manifest duty of the State to interpose as it has done, and call it to account; and if the charge made is established, a deserving penalty ought to be inflicted." See also, *People v. Chicago Gas Trust Co.*, 130 Ill. 268 (1889), (22 N. E. Rep. 798, 17 Am. St. Rep. 319).

¹ In *State v. Portland Natural Gas, etc. Co.*, 153 Ind. 491 (1899), (53 N. E. Rep. 1089, 74 Am. St. Rep. 314), the Court further said: "The rule is well settled that a court, in cases in *quo warranto* proceedings like this, if the facts justify, may, in the exercise of its discretion, render a judgment against the defendant declaring a forfeiture of its corporate franchises, or the judgment may be a forfeiture or ouster only of the right of the defendant to carry out or continue the illegal act or acts charged and established." See also, *State v. Standard Oil Co.*, 49 Ohio St. 137 (1892), (30 N. E. Rep. 279, 34 Am. St. Rep. 541, 15 L. R. A. 145).

² In *Trust Co. v. State*, 109 Ga. 747 (1900), (35 S. E. Rep. 323), the Supreme Court of Georgia said: "We have reached the conclusion that the sounder reasoning is in favor of allowing to the State relief by injunction whenever it is proceeding in the interest of the public to prevent a threatened injury. As

harsh as the remedy by injunction is generally considered, it is certainly not as severe as would be a proceeding in the nature of *quo warranto*, instituted for the purpose of forfeiting the charter of a corporation. The one is instituted, not for the purpose of causing a destruction of the corporation, but to prevent it from entering into transactions violative of the public policy of the State, and to protect the interest of the public against a threatened wrong. The other remedy, if enforced, would cause the death of the corporation, thus forever preventing it from serving the public interests, or meeting the public demands upon its business, and often result in a wreckage of the property of its owners. We can, therefore, see no reason why, if the remedy for the wrongs threatened can be as well prevented by injunction, it would not be the more readily and properly applied than the harsher one of forfeiture or confiscation."

See also, *Stockton v. Central R. Co.*, 50 N. J. Eq. 52 (1892), (24 Atl. Rep. 964); *Queen Ins. Co. v. State* (Tex. Civ. App. 1893), 22 S. W. Rep. 1048, 22 L. R. A. 483; *Attorney-General v. Great Northern R. Co.*, 1 Drew & S. 154 (1860), (6 Jur. (n. s.), 1009). As to injunction against unincorporated combination, see *State v. American Cotton*

If the State waits until the combination has been perfected, it may be partially deprived of its equitable remedy. An injunction will undoubtedly lie to restrain the continued operation of an association or trust, but it cannot be employed, as a substitute for *quo warranto* proceedings, to attack the corporate existence of a corporate combination. When a corporate combination has been formed, has acquired the plants of other companies and is transacting business, — all in the exercise of its apparent powers — an injunction restraining it from the exercise of those powers, upon the ground that it was formed for an unlawful purpose, would be equivalent to an annulment of its charter. In such a case, *quo warranto* is the only remedy.¹

§ 375. Evidence. — The existence of an unlawful combina-

Oil Trust, 40 La. Ann. 8 (1888), (3 So. Rep. 409, 19 Am. & Eng. Corp. Cas. 448).

¹ *Stockton v. American Tobacco Co.*, 55 N. J. Eq. 368 (1897), (36 Atl. Rep. 971): "The first question which concerns us is whether these attacks upon the manner of creating the company do not directly challenge the existence of the corporation itself, for if this be so, it is entirely settled, in this State, that a court of equity has no jurisdiction to consider the matter at all. . . . (p. 370.) Now, in the case at bar it is charged that the purpose of the five concerns, the owners of which projected a scheme of incorporation, was to coalesce their separate competing business into one organization, for the purpose of destroying competition and controlling the trade in cigarettes. Whether the contracts preceding the act of incorporation . . . were inimical to public policy, I shall not stop to consider. If so, the agreement or agreements would have been unenforceable in any court, and it may be that upon a bill filed by the attorney-general such contract would have been annulled. But that contract has been executed. As a contract it has ceased to have any efficacy whatever. All that can be said of it in this

case is that its provisions exhibit the purposes for which the corporation was organized, and the sole question here is whether, if such purpose appears to have been to establish a monopoly through the instrumentality of this corporate organization, this court can, upon that ground, restrain any act done by the corporation itself within its corporate power. Now that such an exertion of power by a court of equity would strike at the authority of the corporation to act at all as a corporation is perfectly clear. The corporation must be either a legal or an illegal entity. If legal, then, as I have already observed, it possesses the right to dispose of its goods in its adopted manner. If illegal, it has no right to transact any business at all as a corporation. An injunction which would, in the language of the prayer of the bill, restrain the company from using the corporate organization in the conduct of their business of making and selling paper cigarettes, and from carrying on any portion of their business in the name of the American Tobacco Company, would be as efficient an annulment of their franchise as would be a judgment against them upon *quo warranto*."

tion must be shown by evidence. Proof that a combination exists is not proof of its illegality.¹

In establishing the illegal character of a combination, however, direct evidence of an unlawful object is not necessary.² The purpose of a combination to control the market is seldom evidenced by a single instrument, or expressly stated in any instrument. It is shown by a series of acts and transactions. Similarly, an illegal combination of *quasi*-public corporations may be of the most innocent character in its stated purpose.

It is the duty of the court to view the agreement of the parties in the light of all the surrounding circumstances, and to receive any evidence tending to show the true situation and real purposes of the parties to the combination. This course has been followed by the courts in the leading cases of *quo warranto* which have already been adverted to.³

¹ *Herriman v. Menzies*, 115 Cal. 16 (1896), (44 Pac. Rep. 660, 56 Am. St. Rep. 81, 35 L. R. A. 319): "We are not at liberty to indulge in inferences which would restrict the parties in their right to combine their interests. Parties are to be given the widest latitude to make contracts with reference to their private interests, and the invalidity of such contracts is never to be inferred, but must be clearly made to appear."

See also *Leslie v. Lorillard*, 110 N. Y. 533 (1888), (18 N. E. Rep. 363); *Central Shade Roller Co. v. Cushman*, 143 Mass. 353 (1887), (9 N. E. Rep. 629).

² *Harding v. American Glucose Co.*, 182 Ill. 635 (1899), (55 N. E. Rep. 577, 74 Am. St. Rep. 189): "It makes no difference that the agreement for the illegal combination is not a formal written

agreement. It may be a verbal agreement or understanding, or a scheme not embodied in writing, but evidenced by the action of the parties." See also post, § 421: "*Evidence*" (under "State anti-trust statutes").

³ *People v. North River Sugar Ref'g Co.*, 121 N. Y. 582 (1889), (24 N. E. Rep. 834, 18 Am. St. Rep. 843); *State v. Standard Oil Co.*, 49 Ohio St. 137 (1892), (30 N. E. Rep. 279, 34 Am. St. Rep. 541, 15 L. R. A. 145); *Distilling, etc. Co. v. People*, 156 Ill. 448 (1895), (41 N. E. Rep. 188, 47 Am. St. Rep. 200); *People v. Chicago Gas Trust Co.*, 130 Ill. 268 (1889), (22 N. E. Rep. 798, 17 Am. St. Rep. 319); *State v. Nebraska Distilling Co.*, 29 Neb. 700 (1890), (46 N. W. Rep. 155).

ARTICLE III.

LEGISLATION AFFECTING COMBINATIONS.

L

FEDERAL ANTI-TRUST STATUTE.

CHAPTER XXXVIII.

THE STATUTE AND ITS CONSTITUTIONALITY.

§ 376. The Statute.

§ 377. Analysis of Statute.

§ 378. Object of Statute.

§ 379. Constitutionality of Act — (A) Power of Congress under Commerce Clause to legislate concerning Private Contracts affecting Interstate Commerce.

§ 380. Constitutionality of Act — (B) Power of Congress under Commerce Clause to prohibit Combinations of Competing Railroads.

§ 381. Constitutionality of Statute — (C) Statute is Constitutional.

§ 376. **The Statute.** — The federal anti-trust act, generally called the “Sherman Act,” and entitled “An Act to protect trade and commerce against unlawful restraints and monopolies,” was approved July 2, 1890. It is printed in full in the foot-note.¹

¹ “§ 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by

both said punishments, in the discretion of the court.

“§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by

§ 377. **Analysis of Statute.**—The sections of the act may be classified, primarily, into

(1.) Section declaring what “restraints and monopolies”

both said punishments, in the discretion of the court.

“§ 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

“§ 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

“§ 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

“§ 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

“§ 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

“§ 8. That the word ‘person’ or ‘persons,’ wherever used in this act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.”

the act is directed against, and prescribing penalties — sections 1, 2 and 3.

(II.) Sections relating to remedies and procedure — sections 4, 5, 6 and 7.¹

(III.) Section declaring rule of construction — section 8.

The last section — forming Class III. and providing that the word “person” or “persons” shall include corporations and associations — requires no analysis. Class II. — the sections relating to remedies and procedure — will be the subject of consideration in another chapter. The several sections in Class I. may be subdivided into

(1) Definitions of offences.

(2) Statements of penalties.

The penalties prescribed in the act will be considered in connection with remedies and procedure. The offences described in the several sections of Class I. are as follows:

Under section 1: Every (a) contract, (b) combination in the form of trust or otherwise, or (c) conspiracy in restraint of trade or commerce among the several States or with foreign nations, is illegal.

Under section 2: Every person who shall (a) monopolize, or (b) attempt to monopolize, or (c) combine or (d) conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States or with foreign nations, shall be deemed guilty of a misdemeanor.

Under section 3: The acts and agreements described in section 1, if in restraint of trade or commerce in any Territory (including the District of Columbia), or between Territories and other Territories, States and foreign nations, are illegal.

From this analysis the following conclusions follow:

1. The “restraints and monopolies” referred in the title to the act are

(A) Contracts, combinations and conspiracies in restraint of interstate (including territorial and interterritorial) and foreign trade or commerce.

¹ Section 6 also provides an additional penalty of forfeiture, and section 7 of treble damages.

(B) Monopolizing, or attempting, combining or conspiring to monopolize interstate or foreign trade or commerce.

2. Such restraints and monopolies are illegal.

§ 378. **Object of Statute.** — The statute is aimed at all restrictions upon interstate commerce. Its purpose is to permit trade and commerce, between the States and with foreign nations, to flow in their natural channels, “unrestricted by any combinations, contracts, conspiracies, or monopolies whatsoever.”¹ In *United States v. Coal Dealers Association*,² Judge Morrow said: “The clear and positive purpose of the statute must be understood to be that trade and commerce, within the jurisdiction of the federal government, shall be absolutely free, and no contract or combination will be tolerated that impedes or restricts their natural flow and volume.”

The purpose of a statute must be gathered, primarily, from its language; and, as will be shown, this act has been construed to apply to combinations of competing carriers, as well as to industrial combinations. An examination of the “history of the times,” moreover, — using a phrase of the Supreme Court of the United States, — will show that while the principal object of Congress, in enacting the statute, may have been the suppression of combinations of industrial corporations in restraint of interstate commerce, the prevention of combinations between competing railroad companies was not outside its purpose.³

¹ *United States v. Hopkins*, 82 Fed. 537 (1897).

² *United States v. Coal Dealers Ass'n*, 85 Fed. 261 (1898).

³ *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 319 (1897), (17 Sup. Ct. Rep. 540): “It is said that Congress had very different matters in view, and very different objects to accomplish in the passage of the act in question; that a number of combinations in the form of trusts and conspiracies in restraint of trade were to be found throughout the country, and that it was impossible for the State governments to successfully cope with them,

because of their commercial character, and of their business extension through the different States of the Union. Among these trusts it was said in Congress, were the Beef Trust, the Standard Oil Trust, the Steel Trust, the Barbed Wire Fence Trust, the Sugar Trust, the Cordage Trust, the Cotton Seed Oil Trust, the Whiskey Trust, and many others, and these trusts, it was stated, had assumed an importance and had acquired a power which were dangerous to the whole country, and that their existence was directly antagonistic to its peace and prosperity. To combinations and conspiracies of this

§ 379. **Constitutionality of Act — (A) Power of Congress under Commerce Clause to legislate concerning Private Contracts affecting Interstate Commerce.** — The Constitution of the United States provides that Congress shall have power “to regulate commerce with foreign nations, and among the several States and with the Indian Tribes.”¹ Under this grant of power, Congress may enact laws declaring illegal and prohibiting the performance of contracts between individuals or corporations, the natural and direct — as distinguished from the incidental and collateral — effect of the operation of which will be to regulate, to any extent, interstate or foreign commerce.² The provision in the Constitution regarding the liberty of the citizen,³ although including liberty of contract, does not limit the power of Congress, under the interstate commerce clause, to legislate upon the subject of

kind, it is contended that the act in question was directed, and not to the combinations of competing railroads to keep up their prices to a reasonable sum for the transportation of persons and property. It is true that many and various trusts were in existence at the time of the passage of the act, and it was probably sought to cover them by the provisions of the act. Many of them had rendered themselves offensive by the manner in which they exercised the great power that combined capital gave them. But a further investigation of ‘the history of the times’ shows also that those trusts were not the only associations controlling a great combination of capital which had caused complaint at the manner in which their business was conducted. There were many and loud complaints from some portions of the public regarding the railroads and the prices they were charging for the service they rendered, and it was alleged that the prices for the transportation of persons and articles of commerce were unduly and improperly enhanced by combinations among the different roads. Whether these complaints were well or ill founded we do not presume at this time and under these circumstances

to determine or discuss. It is simply for the purpose of answering the statement that it was only to trusts of the nature above set forth that this legislation was directed, that the subject of the opinions of the people in regard to the actions of the railroad companies in this particular is referred to. A reference to this history of the times does not, as we think, furnish us with any strong reason for believing that it was only trusts that were in the minds of the members of Congress, and that railroads and their manner of doing business were wholly excluded therefrom.”

¹ Constitution of the United States, Art. I, § 8: “The Congress shall have Power . . . to regulate commerce with foreign nations, and among the several States and with the Indian Tribes.”

² *Addyston Pipe, etc. Co. v. United States*, 175 U. S. 226 (1899), (20 Sup. Ct. Rep. 96); *United States v. Joint Traffic Ass’n*, 171 U. S. 571 (1898), (19 Sup. Ct. Rep. 25).

³ The Fifth Amendment of the Constitution provides that “no person shall be . . . deprived of life, liberty or property without due process of law; nor shall private property be taken without just compensation.”

contracts affecting, in any degree, commerce among the States.

In *Addyston Pipe, etc. Co. v. United States*,¹ Mr. Justice Peckham said: "It is insisted by the appellants, at the threshold of the inquiry, that, by the true construction of the Constitution, the power of Congress to regulate interstate commerce is limited to its protection from acts of interference by State legislation or by means of regulations made under the authority of the State by some political subdivision thereof, . . . but that it does not include the general power to interfere with or prohibit private contracts between citizens, even though such contracts have interstate commerce for their object, and result in a direct and substantial obstruction to or regulation of that commerce. . . . The power to regulate interstate commerce is, as stated by Chief Justice Marshall, full and complete in Congress, and there is no limitation in the grant of the power which excludes private contracts of the nature in question from the jurisdiction of that body. Nor is any such limitation contained in the other clause of the Constitution, which provides that no person shall be deprived of life, liberty, or property without due process of law. . . . The provision in the Constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above nature, while in the exercise of its constitutional right to regulate commerce among the States. On the contrary, we think the provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution, and that the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally and collaterally, regulate, to a greater or less degree, commerce among the States."²

¹ *Addyston Pipe, etc. Co. v. United States*, 175 U. S. 226 (1899), (20 Sup. Ct. Rep. 96).

² Compare this decision with that in *In re Greene*, 52 Fed. 112 (1892), where

the constitutional limitations upon the power of Congress are also considered, Judge Jackson said: "Congress may place restrictions and limitations upon and right of corporations created and

§ 380. **Constitutionality of Act — (B) Power of Congress under Commerce Clause to prohibit Combinations of Competing Railroads.** — In the exercise of the power conferred in the interstate commerce clause of the Constitution, Congress may enact legislation, applicable to railroad companies, declaring illegal all contracts and combinations which, in its opinion, restrain or impede interstate or foreign commerce by restricting or extinguishing competition.¹ It is for Congress to determine what contracts and combinations are prejudicial to the public welfare, and the courts may not declare an act of Congress unconstitutional on account of such determination, except, possibly, in a case of gross abuse of power.

In *United States v. Joint Traffic Association*,² the Supreme Court of the United States said: “Has not Congress, with regard to interstate commerce and in the course of regulating it, in the case of railroad corporations, the power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general laws of competition? We think it has. . . . The business of a railroad carrier is of a public nature, and, in performing it, the carrier is also performing, to a certain extent, a function of government which, as counsel observed, requires them to perform the service upon equal terms to all. This public service, that of transportation of

organized under its authority to acquire, use, and dispose of property. It may also impose such restrictions and limitations upon the citizen in respect to the exercise of a public privilege or franchise conferred by the United States. But Congress, certainly, has not the power or authority under the commerce clause, or any other provision of the Constitution, to limit and restrict the right of corporations created by the States, or the citizens of the States, in the acquisition, control, and disposition of property. Neither can Congress regulate or prescribe the price or prices at which such property, or the products thereof, shall be sold by the owner or owners, whether corporations or individuals. It is equally clear that Con-

gress has no jurisdiction over, and cannot make criminal, the aims, purposes, and intentions of persons in the acquisition and control of property, which the States in their residence or creation sanction and permit. It is not material that such property, or the products thereof, may become the subject of trade and commerce among the several States or with foreign nations.”

¹ *United States v. Joint Traffic Ass’n*, 171 U. S. 505 (1898), (19 Sup. Ct. Rep. 25); *United States v. Trans-Missouri Freight Ass’n*, 166 U. S. 290 (1897), (17 Sup. Ct. Rep. 540).

² *United States v. Joint Traffic Ass’n*, 171 U. S. 566 (1898), (19 Sup. Ct. Rep. 25).

passengers and freight, is a part of trade and commerce, and when transported between States such commerce becomes what is described as interstate, and comes, to a certain extent, under the jurisdiction of Congress, by virtue of its power to regulate commerce among the several States. Where the grantees of this public franchise are competing railroad companies for interstate commerce, we think Congress is competent to forbid any agreement or combination among them by means of which competition is to be smothered. Although the franchise, when granted by the State, becomes by the grant the property of the grantee, yet there are some regulations respecting the exercise of such grants which Congress may make under its power to regulate commerce among the several States. This will be conceded by all, the only question being as to the extent of the power. We think it extends, at least, to the prohibition of contracts relating to interstate commerce, which would extinguish all competition between otherwise competing railroad corporations, and which would, in that way, restrain interstate trade or commerce. . . . The prohibition of such contracts may, in the judgment of Congress, be one of the reasonable necessities for the proper regulation of commerce, and Congress is the judge of such necessity and propriety, unless, in case of a possible gross perversion of the principle, the courts might be applied to for relief."

§ 381. **Constitutionality of Statute — (C) Statute is Constitutional.** — It follows, as a corollary to the conclusions reached in the preceding sections, that the federal anti-trust statute, having been enacted by Congress in the exercise of the power conferred upon it by the commerce clause of the Constitution, and having for its object the elimination of all contracts, combinations and conspiracies for restraining or monopolizing interstate or foreign commerce, is constitutional; and it has been so held by the Supreme Court of the United States.¹

¹ *Addyston Pipe, etc. Co. v. United States*, 175 U. S. 211 (1899), (20 Sup. Ct. Rep. 96); *United States v. Joint Traffic Ass'n*, 171 U. S. 505 (1898), (19 Sup. Ct. Rep. 25).

See also *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290 (1897), (17 Sup. Ct. Rep. 540); *United States v. Jellico Mountain Coal, etc. Co.*, 46 Fed. 432 (1891).

CHAPTER XXXIX.

CONSTRUCTION AND APPLICATION OF FEDERAL STATUTE.

- § 382. Title of Statute.
- § 383. Use of Phrase "Contract in Restraint of Trade."
- § 384. Meaning of Term "Monopolize."
- § 385. Meaning of Phrase, "Trade or Commerce among the Several States."
- § 386. Statute applies only to Restraints upon Interstate or International Trade or Commerce.
- § 387. Previous Legality or Reasonableness of Restraint immaterial.
- § 388. Combination must have Direct Effect upon Interstate Commerce — (A) In General.
- § 389. Combination must have Direct Effect upon Interstate Commerce — (B) Combinations of Manufacturers. Distinction between Manufacture and Commerce.
- § 390. Combination must have Direct Effect upon Interstate Commerce — (C) Restraints upon Facilities for Commerce.
- § 391. Combination must have Direct Effect upon Interstate Commerce — (D) Exchanges and Similar Associations.
- § 392. Statute applies to Combinations of Railroad Companies and other Carriers.
- § 393. Form of Combination immaterial. Illegality of Corporate Device.
- § 394. Statute inapplicable to State's Monopoly and to Monopoly under Patent.
- § 395. Statute not retroactive but applies to Continuing Combinations.

§ 382. **Title of Statute.** — The title of the federal anti-trust statute is "An Act to protect trade and commerce from unlawful restraints and monopolies."

The body of the act declares illegal "*every* contract . . . in restraint of trade or commerce," etc., but does not use the word "unlawful."

It seems manifest that the word "unlawful" in the title applies to the acts declared illegal in the body of the act, without regard to their previous illegality at common law or under State statutes. In the *Trans-Missouri Freight Association Case*, however, it was contended that the title indicated an intention to include only those contracts which were unlawful at common law, but which would require a federal statute to be dealt with in a federal court. In answer to this contention, Mr. Justice Peckham said:¹ "It is said

¹ *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 327 (1897), (17 Sup. Ct. Rep. 540). See also *United States v. Coal Dealers Ass'n*, 85 Fed. 261 (1898).

that when terms which are known to the common law are used in a federal statute, those terms are to be given the same meaning that they received at common law, and that when the language of the title is to 'protect trade and commerce against unlawful restraints and monopolies,' it means those restraints and monopolies which the common law regarded as unlawful, and which were to be prohibited by the federal statute. We are of opinion that the language used in the title refers to and includes, and was intended to include, those restraints and monopolies which are made unlawful in the body of the statute. It is to the statute itself that resort must be had to learn the meaning thereof, though a resort to the title here creates no doubt about the meaning of, and does not alter, the plain language contained in its text."

§ 383. **Use of Phrase "Contract in Restraint of Trade."** — As already shown, while the phrase, "contract in restraint of trade," has acquired a well-defined meaning as applying to contracts whereby a person is incidentally restrained from following some particular trade, business or occupation, in modern use it has been given — most unwisely — a broader meaning, corresponding with the signification of the words composing it.¹

In the federal statute, it is clear that the phrase is used in a broad sense. The purpose of the act is to protect interstate trade and commerce, and its application can hardly be confined to a class of contracts which, except in the possible instance of a collateral agreement to refrain from engaging in the transportation business, could not directly affect interstate commerce at all. In fact, the Supreme Court of the United States has expressed a doubt whether contracts in restraint of trade, in the primary sense, come within the provisions of the act. In the *Trans-Missouri Freight Association Case*,² Mr. Justice Peckham again said: "A contract

¹ *Ante*, § 336: "Modern Use of Phrase 'Contract in Restraint of Trade.'"

² *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 329 (1897), (17 Sup. Ct. Rep. 540). In *Addyston Pipe*,

etc. Co. v. United States, 175 U. S. 244 (1899), (20 Sup. Ct. Rep. 96), the Supreme Court said: "We have no doubt but that where the direct and immediate effect of a contract or combina-

which is the mere accompaniment of the sale of property, and thus entered into for the purpose of enhancing the price at which the vendor sells it, which, in effect, is collateral to such sale, and where the main purpose of the whole contract is accomplished by such sale, might not be included within the title or the spirit of the statute in question."

With this possible exception of the very class of contracts which are *primarily* contracts in restraint of trade, the phrase "contract in restraint of trade" as used in the statute, includes, adopting the language of the Supreme Court, in the case referred to, "*all kinds of those contracts which in fact restrain, or may restrain, trade.*"

§ 384. **Meaning of Term "Monopolize."** — The verb "monopolize," as used in the second section of the statute, clearly has no reference to the acquisition of a monopoly through legislative grant, and, upon principle, should have a meaning corresponding to that attaching to the noun "monopoly," in modern use.¹ The word "monopolies" in the title of the act is also used in the modern and commercial sense.

The term "monopolize" as used in this act, moreover, has been specifically defined:

Monopolize: "To secure or acquire an exclusive right in such [interstate] commerce by means which prevent others from engaging therein."²

tion among particular dealers in a commodity is to destroy competition between them and others so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity at the enhanced price are continually being made. Total suppression of the trade in a commodity is not necessary in order to render the combination one in restraint of trade."

Agreements by dealers to purchase all of a certain product used by them from a producer controlling the greater part of such product, in consideration of rebates, have been held not to be contracts in restraint of trade within the

meaning of the federal anti-trust statute. *United States v. Greenhut*, 51 Fed. 213 (1892). *In re Corning*, 51 Fed. 205 (1892); *In re Terrill*, 51 Fed. 213 (1892); *In re Greene*, 52 Fed. 104 (1892).

It must be observed, however, that the earlier decisions of the circuit and district courts construing the federal statute can only be safely followed when read in the light of the later decisions of the Supreme Court of the United States definitely construing its provisions.

¹ *Ante*, § 332: "*Modern Use of Term 'Monopoly.'*"

² *In re Greene*, 52 Fed. 115 (1892): "A 'monopoly,' in the prohibited sense, involves the element of an exclusive privilege or grant which restrained

The word, as so used, has also been defined in more general terms:

Monopolize: "To 'aggregate' or 'concentrate' in the hands of a few, practically and as a matter of fact, and according to the known results of human action, to the exclusion of others."¹

others from the exercise of a right or liberty which they had before the monopoly was secured. In commercial law, it is the abuse of free commerce, by which one or more individuals have procured the advantage of selling alone or exclusively all of a particular kind of merchandise or commodity to the detriment of the public. As defined by Blackstone (4 Bl. Com. 159), and by Lord Coke (3 Co. Inst. 181), it is a grant from the sovereign power of the State by commission, letters patent, or otherwise, to any person or corporation, by which the exclusive right of buying, selling, making, working, or using anything is given. When this section of the act was under consideration in the Senate, distinguished members of its judicial committee and lawyers of great ability explained what they understood the term 'monopoly' to mean; one of them saying: 'It is the sole engrossing to a man's self by means which prevent other men from engaging in fair competition with him.' Another senator defined the term in the language of Webster's Dictionary: 'To engross or obtain, by any means, the exclusive right, especially of the right of trading, to any place or with any country or district; as to monopolize the India or Levant trade.' It will be noticed that, in the foregoing definitions of 'monopoly,' there is embraced two leading elements, viz., an exclusive right or privilege, on the one side, and a restriction or restraint on the other, which will operate to prevent the exercise of a right or liberty open to the public before the monopoly was secured. This being, as we think, the general meaning of the term, as employed in the second section of the statute, an 'attempt to monopo-

lize' any part of the trade or commerce among the States must be an attempt to secure or acquire an exclusive right in such trade or commerce by means which prevent or restrain others from engaging therein."

¹ In *American Biscuit, etc. Co. v. Klotz*, 44 Fed. 724 (1891), the Court thus discussed the meaning of the word "monopolize," as used in the federal anti-trust law and in the Louisiana statute (*post*, § 405, *note*): "In construing the federal and State statutes, we exclude from consideration all monopolies which exist by legislative grant; for we think the word 'monopolize' cannot be intended to be used with reference to the acquisition of exclusive rights under government concession, but that the law-maker has used the word to mean 'to aggregate' or 'concentrate' in the hands of a few, practically, and, as a matter of fact, and according to the known results of human action, to the exclusion of others; to accomplish this end by what, in popular language is expressed in the word 'pooling,' which may be defined to be an aggregation of property or capital belonging to different persons, with a view to common liabilities and profits. . . . One just and decisive test of the meaning of the expression 'to monopolize,' is obtained by getting at the evil which the law-maker has endeavored to abolish and restrict. The statutes show that the evil was the hindrance and oppression in trade and commerce wrought by its absorption in the hands of the few, so that the prices would be in danger of being arbitrarily and exorbitantly fixed, because all competition would be swallowed up, so that the man of small means would find himself excluded from the restrained or

The second section of the statute, in so far as it provides a penalty for the act of a particular person or corporation in monopolizing trade or commerce, has no relation to combinations; and, in so far as it relates to combinations of persons or corporations for such purpose, only includes offences already covered by the provisions of the first section. Every combination or conspiracy to monopolize trade is a combination or conspiracy *in restraint of trade*.

In order to bring a combination within the second section of the act, it is not necessary that the result of its operation should be complete monopoly, nor that it should have resulted in actual injury to the public. The essential question is whether the contract confers power to monopolize.¹

§ 385. **Meaning of Phrase, "Trade or Commerce among the Several States."** — The use of both the terms "trade" and "commerce" in the statute — especially disjunctively — indicates a belief on the part of the framers of the act that a wider commercial field was thereby covered than by the use of the term "commerce" alone. Such is not the case. The word "trade" is used in the sense of traffic and, broadly speaking, all traffic is commerce, although all commerce is not traffic.² In the often quoted words of Chief Justice

monopolized trade or commerce as absolutely as if kept out by law or force."

¹ *United States v. E. C. Knight Co.*, 156 U. S. 16 (1895), (15 Sup. Ct. Rep. 249): "Again, all authorities agree that in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition."

United States v. Chesapeake, etc. Fuel Co., 105 Fed. 104 (1900) *affirmed* 115 Fed. 610 (1902): "All competition among the members of the association in the production, shipment, and sale of their product is eliminated, and the combination enters the Western markets clothed with powers which en-

able it to exercise a large influence in those markets in regulating the supply and the prices of coal and coke. These provisions are in restraint of trade, and tend to monopoly, within the meaning of the Act of Congress, and render the contract illegal, in so far as it relates to interstate commerce. The important question is not whether the performance of the contract so far has resulted in actual injury to trade, but whether the contract confers power to regulate and restrain trade, upon those charged with its performance."

As indicated by the language of the last decision the principles there stated are equally applicable to combinations in restraint of trade under the first section of the act.

² In *United States v. Debs*, 64 Fed. 751 (1894), Judge Woods said in ref-

Marshall in the first interstate commerce case:¹ "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

The word "trade" in the act, in legal effect, is superfluous, although it is so woven into the decisions construing the act that it may not be disregarded. It covers nothing not embraced by the word "commerce;" and if it did, the act would be unconstitutional. Congress has power to regulate commerce. It may regulate trade only if trade is commerce. The phrase "trade or commerce among the

ference to the federal statute: "I am unable to regard the word 'commerce,' in this statute, as synonymous with 'trade,' as used in the common law phrase 'restraint of trade.' In its general sense, trade comprehends every species of exchange or dealing, but its chief use is 'to denote the barter or purchase and sale of goods, wares, and merchandise, either by wholesale or retail,' and so it is used in the phrase mentioned. But 'commerce' is a broader term. It is the word in that clause of the constitution by which power is conferred on Congress 'to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes.' Const. U. S. Art. I. § 8. In a broader and more distinct exercise of that power than ever before asserted Congress passed the enactments of 1887 and 1888 known as the 'Interstate Commerce Law.' The present statute is another exercise of that constitutional power, and the word 'commerce,' as used in that statute, as it seems to me, need not and should not be given a meaning more restricted than it has in the Constitution. . . . These definitions and expositions of the scope and law of interstate commerce, except the last, preceded the enactment by Congress on the subject. It was therefore of commerce so defined, embracing all

instrumentalities and subjects of transportation among the States, that Congress, by that legislation, assumed the control; and I see no reason for thinking that, as employed in the act of 1890, which is essentially supplemental of the other acts, the word was intended to be less comprehensive."

In *In re Debs*, 158 U. S. 564 (1895), (15 Sup. Ct. Rep. 900), the Supreme Court of the United States did not pass upon the question considered by Judge Woods in reference to the anti-trust act.

With reference to the provision in the Texas anti-trust statute making unlawful combinations to "create or carry out restrictions in trade," the Court in *Queen Ins. Co. v. State* (Tex. 1893), 22 S. W. Rep. 1048, 22 L. R. A. 490, said: "In ordinary language the word 'trade,' is employed in three different senses: First, in that of the business of buying and selling; second, in that of an occupation generally; and, third, in that of a mechanical employment in contradistinction to agriculture and the liberal arts. Ordinarily, when we speak of 'trade,' we mean commerce, or something of that nature; when we speak of 'a trade,' we mean an occupation in the more general or the limited sense."

¹ *Gibbons v. Ogden*, 9 Wheat. (U. S.) 189 (1824).

several States" means *interstate commerce* — nothing more or less.

Interstate commerce consists of intercourse and traffic between citizens or inhabitants of different States, and includes the purchase, sale and exchange of commodities, and the transportation of persons and property.¹

§ 386. Statute applies only to Restraints upon Interstate or International Trade or Commerce. — The statute declares all contracts, combinations and conspiracies "in restraint of trade or commerce among the several States, or with foreign nations," illegal. It deals only with restraints upon those forms of commerce which Congress has power to regulate and, in law, as upon its face, is applicable only to contracts, combinations or conspiracies, in restraint of, or for the purpose of monopolizing, *interstate* or *international* commerce.²

¹ *Addyston Pipe, etc. Co. v. United States*, 175 U. S. 241 (1899), (20 Sup. Ct. Rep. 96) (*per* Peckham, J.): "As has frequently been said, interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different States, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities."

Hopkins v. United States, 171 U. S. 597 (1898), (19 Sup. Ct. Rep. 40), (also *per* Peckham, J.): "Definitions as to what constitutes interstate commerce are not easily given so that they shall clearly define the full meaning of the term. We know from the cases decided in this court that it is a term of very large significance. It comprehends, as it is said, intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale and exchange of commodities between the citizens of different States, and the power to regulate it embraces all the instruments by which such commerce may be conducted."

See also *United States v. E. C. Knight Co.*, 156 U. S. 1 (1895), (15 Sup. Ct. Rep.

249); *Hooper v. California*, 155 U. S. 653 (1895), (15 Sup. Ct. Rep. 207); *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 (1885), (5 Sup. Ct. Rep. 826); *County of Mobile v. Kimball*, 102 U. S. 691 (1880).

In *In re Greene*, 52 Fed. 113 (1892), Judge Jackson said: "Commerce among the States, within the exclusive regulating power of Congress, consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, as well as the purchase, sale, and exchange of commodities. . . . In the application of this comprehensive definition, it is settled by the decisions of the Supreme Court that such commerce includes, not only the actual transportation of commodities and persons between the States, but also the instrumentalities and processes of such transportation. That it includes all the negotiations and contracts which have for their object, or involve, as an element thereof, such transmission or passage from one State to another."

² *Addyston Pipe, etc. Co. v. United States*, 175 U. S. 211 (1899), (20 Sup. Ct. Rep. 96); *United States v. Joint Traffic Ass'n*, 171 U. S. 558 (1898), (19 Sup. Ct. Rep. 25); *Hopkins v. United*

In *Hopkins v. United States*¹ the Supreme Court of the United States said: "The act has reference only to that trade or commerce which exists, or may exist, among the several States or with foreign nations, and has no application whatever to any other trade or commerce."

§ 387. **Previous Legality or Reasonableness of Restraint immaterial.** — The statute declares every contract in restraint of interstate trade or commerce, without exception or limitation, illegal. The extent of the restraint imposed is not material. The essential question, in any case, is whether the contract under consideration directly imposes any restraint whatever. If it does, no matter how slight or how reasonable, it is within the prohibition of the statute.

Contracts and combinations in unreasonable restraint of trade were illegal before the enactment of this statute, and a construction limiting its application to that class of contracts would deprive it of any efficacy in "protecting trade and commerce," except as imposing additional penalties for existing offences, and would constitute judicial legislation by reading into the statute that which Congress did not choose to place there. As said by the Supreme Court of the United States:² "By the simple use of the term 'con-

States, 171 U. S. 558 (1898), (19 Sup. Ct. Rep. 40); *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290 (1897), (17 Sup. Ct. Rep. 540); *United States v. E. C. Knight Co.*, 156 U. S. 1 (1895), (15 Sup. Ct. Rep. 249); *Gibbs v. McNeeley*, 107 Fed. 210 (1901), *Dueber Watch-Case Mfg. Co. v. Howard Watch, etc. Co.*, 66 Fed. 639 (1895); *National Distilling Co. v. Cream City Importing Co.*, 86 Wis. 352 (1893), (39 Am. St. Rep. 902).

¹ *Hopkins v. United States*, 171 U. S. 586 (1898), (19 Sup. Ct. Rep. 40).

² *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 328 (1897), (17 Sup. Ct. Rep. 540). In reaching the conclusion stated in the text Mr. Justice Peckham said: "It is now with much amplification of argument urged that the statute, in declaring illegal every combination in the form of trust or

otherwise, or conspiracy in restraint of trade or commerce, does not mean what the language used therein plainly imports, but that it only means to declare illegal any such contract which is in *unreasonable* restraint of trade, while leaving all others unaffected by the provisions of the act; that the common-law meaning of the term "contract in restraint of trade" includes only such contracts as are in unreasonable restraint of trade, and when that term is used in the federal statute, it is not intended to include all contracts in restraint of trade, but only those which are in unreasonable restraint thereof. The term is not of such limited signification. Contracts in restraint of trade have been known and spoken of for hundreds of years, both in England and this country, and the term includes all kinds of those contracts which in

tract in restraint of trade,' all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress."

§ 388. **Combination must have Direct Effect upon Interstate Commerce — (A) In General.** — There are few commercial contracts or combinations which cannot be said to have, indirectly or remotely, some bearing upon interstate commerce and, possibly, to restrain it. Private enterprises may be carried on by means of interstate shipments. Articles may be manufactured which the manufacturer intends to sell in another State. Combinations may be formed which result in enhancing the cost of conducting an interstate business. These agreements, and others of a similar nature which readily suggest themselves, may affect — and, perhaps, interfere with — interstate commerce without contravening the federal statute, because the restraint produced is not direct.¹

fact restrain or may restrain trade. Some of such contracts have been held void and unenforceable in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. A contract may be in restraint of trade and still be valid at common law. Although valid, it is nevertheless a contract in restraint of trade and would be so described either at common law or elsewhere."

See also *United States v. Joint Traffic Ass'n*, 171 U. S. 505 (1898), (19 Sup. Ct. Rep. 25); *United States v. Chesapeake, etc. Fuel Co.*, 105 Fed. 104 (1900); *affirmed* 115 Fed. 610 (1902);

United States v. Coal Dealers Ass'n, 85 Fed. 261 (1898).

In the *Trans-Missouri Freight Ass'n Case* Justice White delivered an elaborate dissenting opinion, concurred in by Justices Field, Gray and Shiras, in which he reached the conclusion that the act applied only to contracts in *unreasonable* restraint of trade. The same view was also expressed in the earlier cases of *Prescott, etc. R. Co. v. Atchison, etc. R. Co.*, 73 Fed. 438 (1896); *Dueber Watch Case Mfg. Co. v. Howard Watch, etc. Co.*, 66 Fed. 637 (1895); *In re Greene*, 52 Fed. 104 (1892); *In re Nelson*, 52 Fed. 647 (1892).

¹ *Addyston Pipe, etc. Co. v. United*

The statute must receive a reasonable construction,¹ and a combination or contract, to fall within the provisions, must

States, 175 U. S. 246 (1899), (20 Sup. Ct. Rep. 96): "It is almost needless to add that we do not hold that every private enterprise which may be carried on, chiefly or in part, by means of interstate shipments, is, therefore, to be regarded as so related to interstate commerce as to come within the regulating power of Congress. Such enterprises may be of the same nature as the manufacturing of refined sugar in the *Knight Case*, (*United States v. E. C. Knight Co.*, 156 U. S. 1) (1895), (15 Sup. Ct. Rep. 249)) — that is, the parties may be engaged as manufacturers of a commodity which they thereafter intend at some time to sell, and, possibly, to sell in another State; but such sale, as we have already held, is an incident to and not the direct result of the manufacture, and so is not a regulation of, or an illegal interference with interstate commerce."

Hopkins v. United States, 171 U. S. 592 (1898), (19 Sup. Ct. Rep. 40): "The contract condemned by the statute is one whose direct and immediate effect is a restraint upon that kind of trade or commerce which is interstate. . . . To treat as condemned by the act all agreements under which, as a result, the cost of conducting an interstate business may be increased would enlarge the application of the act far beyond the fair meaning of the language used. There must be some direct and immediate effect upon interstate commerce to come within the act. . . . Many agreements suggest themselves which relate only to facilities furnished commerce, or else touch it in an indirect way, while possibly enhancing the cost of transacting the business, and which, at the same time, we would not think of as agreements in restraint of interstate trade or commerce. . . . An agreement may in a variety of ways affect interstate commerce just as state legislation may, and

yet, like it, be entirely valid, because the interference produced by the agreement, or by the legislation, is not direct."

Anderson v. United States, 171 U. S. 615 (1898), (19 Sup. Ct. Rep. 50): "It has already been stated in the *Hopkins case*, above mentioned, that, in order to come within the provisions of the statute, the direct effect of an agreement or combination must be in restraint of that trade or commerce which is among the several States or with foreign nations."

United States v. Joint Traffic Ass'n, 171 U. S. 569 (1898), (19 Sup. Ct. Rep. 25): "The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation with no purpose to thereby affect or restrain commerce is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce."

See also *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290 (1897), (17 Sup. Ct. Rep. 540); *United States v. E. C. Knight Co.*, 156 U. S. 12 (1895), (15 Sup. Ct. Rep. 249); *Union Sewer Pipe Co. v. Connolly*, 99 Fed. 354 (1900); *affirmed* 184 U. S. 540 (1902); *United States v. Coal Dealers Ass'n*, 85 Fed. 252 (1898); *United States v. Chesapeake, etc. Fuel Co.*, 105 Fed. 93 (1900); *affirmed* 115 Fed. 610 (1902); *Lowry v. Tile, etc. Ass'n*, 106 Fed. 38 (1900); *United States v. Jellico Mountain Coal, etc. Co.*, 46 Fed. 432 (1891).

¹ *Hopkins v. United States*, 171 U. S. 600 (1898), (19 Sup. Ct. Rep. 40): "The act of Congress must have a reasonable construction or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce and possibly to restrain it."

have some direct and immediate effect in restraint of commerce among the States. It is inapplicable to combinations whose effect upon interstate commerce is indirect or incidental only.

§ 389. **Combination must have Direct Effect upon Interstate Commerce — (B) Combinations of Manufacturers. Distinction between Manufacture and Commerce.** — Manufacture is transformation. Commerce is intercourse.¹ “Commerce succeeds to manufacture and is not a part of it.”² Reducing raw materials into finished products directly involves neither transportation nor traffic. Commerce — State and interstate — begins only when the process of manufacture is completed. The article produced, itself, becomes the subject of interstate commerce only when its transportation from one State to another commences.³ The purpose and intent of the

¹ In *Kidd v. Pearson*, 128 U. S. 20 (1888), (9 Sup. Ct. Rep. 6), Mr. Justice Lamar said: “No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. . . . If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all the productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not

the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform, and vital interests—interests which in their nature are, and must be, local in all the details of their successful management.”

² *United States v. E. C. Knight Co.* 156 U. S. 12 (1895), (15 Sup. Ct. Rep. 249).

³ *In re Greene*, 52 Fed. 113 (1892), (Jackson, J.): “When commerce begins is determined not by the character of the commodity, nor by the intention of the owner to transfer it to another State for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another State. At that time the power and regulating authority of the States ceases, and that of Congress attaches and continues, until it has reached another State, and becomes mingled with the general mass of property in the latter State.

manufacturer in producing it do not determine when or whether it belongs to interstate commerce.¹

Contracts for the sale and transportation across State lines of manufactured articles are proper subjects of regulation by Congress, because they form part of interstate commerce. A combination, however, simply for the purpose of controlling *manufacture*, is not in violation of the federal statute because, upon principles already indicated, such a combination does not directly affect or restrain interstate commerce.² Even if such a combination directly affected commerce within a State it would not come within the provisions of the statute, for State commerce is a matter of State control. These principles are clearly stated in the opinion of Mr. Chief Justice Fuller in *United States v. E. C. Knight Company*:³

Neither the production nor manufacture of articles or commodities which constitutes subjects of commerce, and which are intended for trade and traffic with citizens of other States, nor the preparation for their transportation from the State where produced or manufactured prior to the commencement of the actual transfer or transmission thereof to another State, constitutes that interstate commerce which comes within the regulating power of Congress; and, further, after the termination of the transportation of commodities or articles of traffic from one State to another, and the mingling or merging thereof in the general mass of property in the State of destination, the sale, distribution, and consumption thereof in the latter State forms no part of interstate commerce." Citing *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1 (1877); *Brown v. Houston*, 114 U. S. 625 (1885), (5 Sup. Ct. Rep. 1091); *Coe v. Errol*, 116 U. S. 520 (1886), (6 Sup. Ct. Rep. 475); *Robbins v. Shelby Taxing Dist.*, 120 U. S. 497 (1887), (7 Sup. Ct. Rep. 592); *Kidd v. Pearson*, 128 U. S. 1 (1888), (9 Sup. Ct. Rep. 6).

¹ *Addyston Pipe, etc. Co. v. United States*, 175 U. S. 239 (1899), (20 Sup. Ct. Rep. 96); *United States v. E. C. Knight Co.*, 156 U. S. 1 (1895), (15 Sup. Ct.

Rep. 249); *Gibbs v. McNeely*, 107 Fed. 211 (1901).

² *Addyston Pipe, etc. Co. v. United States*, 175 U. S. 239 (1899), (20 Sup. Ct. Rep. 96); *United States v. E. C. Knight Co.*, 156 U. S. 1 (1895), (15 Sup. Ct. Rep. 249); *Dueber Watch Case Mfg. Co. v. Howard Watch, etc. Co.*, 66 Fed. 642 (1895); *Gibbs v. McNeely*, 107 Fed. 211 (1901).

³ *United States v. E. C. Knight Co.*, 156 U. S. 12 (1895), (15 Sup. Ct. Rep. 249). In this case it appeared that the American Sugar Refining Company, a New Jersey corporation, with authority to purchase, refine and sell sugar, had, prior to March, 1892, obtained control of all the sugar refineries in the United States excepting four in Philadelphia, including the E. C. Knight Company, and one, of small capacity, in Boston, with all of which it was in active competition; that, in March, 1892, the American Sugar Refining Company entered into contracts with the stockholders of each of the Philadelphia corporations whereby it purchased their stock with its own stock; and thereby acquired possession of the Philadelphia refineries and business; that there was no concerted action between the stockholders of the companies, but each company acted independently of each other; that

“Doubtless the power to control the manufacture of a given thing involves, in a certain sense, the control of its disposition, but this is the secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. . . . Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State, and belongs to commerce.”

When, however, the combination, although relating to manufacture — to *production* — goes further and restrains the *disposition* of the manufactured article and its distribution among several States, its direct and immediate effect is to restrain interstate commerce, and it comes within the prohibition of the statute. The distinction between combinations simply to control manufacture and production, and those embracing the additional purpose of controlling disposition and distribution, is pointed out by the Supreme Court of the United States in *Addyston Pipe, etc. Company v. United States*,¹ where the combination under consideration

the contracts of sale left the vendors free to engage in the same business; that the object in purchasing the Philadelphia refineries was to obtain more perfect control over the business of refining and selling sugar in the United States.

Bill filed by the United States against E. C. Knight Company charging violation of federal anti-trust act was dismissed by Circuit Court (60 Fed. 306 (1894)); decree affirmed by Circuit Court of Appeals for Third Circuit (60

Fed. 934 (1894)), and by Supreme Court of the United States in the decision above cited.

¹ *Addyston Pipe, etc. Co. v. United States*, 175 U. S. 240 (1899), (20 Sup. Ct. Rep. 96).

In this case, it appeared that six corporations, manufacturing iron pipe in several different States, formed an association whereby the territory in which they principally operated, comprising a large part of the United States, was divided into “reserved” cities and “pay

is distinguished from that involved in the *Knight* case. Mr. Justice Peckham said: "The direct purpose of the combination in the *Knight* case was the control of the manufacture of sugar. There was no combination or agreement, in terms, regarding the future disposition of the manufactured article; nothing looking to a transaction in the nature of interstate commerce. The probable intention on the part of the manufacturer of the sugar to thereafter dispose of it by sending it to some market in another State, was held to be immaterial and not to alter the character of the combination. . . . The case was decided upon the principle that a combination simply to control manufacture was not in violation of the act of Congress, because such contract or combination did not directly control or affect interstate commerce, but that contracts for the sale and transportation to another State of specific articles were proper subjects of regulations, because they did form part of such commerce. We think the case now before us involves contracts of the nature last mentioned, not incidentally or collaterally, but as a direct and immediate result of the combination engaged in by the defendants. . . . If, therefore, an agreement or combination directly restrains, not alone the manufacture, but the purchase, sale or exchange of the manufactured commodity among the several States, it is brought within the provisions of the statute. The power to regulate such commerce, that

territory." The reserved cities were allotted to certain members of the association, free from competition, although the other members agreed to simulate competition by putting in higher bids.

In the pay territory all offers to purchase pipe were submitted to a committee which fixed the price and awarded the contract by an "auction pool"—the member of the association agreeing to pay the largest bonus to be divided among the others receiving the contract. In the "free territory" there were no restrictions upon competition.

Bill by the United States against the Addyston Pipe and Steel Company and the other members of the association,

charging a violation of the federal anti-trust act, was dismissed by the trial court (78 Fed. 712 (1897)), but, upon appeal to the Circuit Court of Appeals for the Sixth Circuit, Judge Taft delivering an able and elaborate opinion (*United States v. Addyston Pipe, etc. Co.*, 85 Fed 271 (1898)), the judgment was reversed, with instructions to enter decree perpetually enjoining the defendants from maintaining or doing any business under said combination. Upon appeal to the Supreme Court of the United States, this decree, modified and limited to that portion of the combination which was interstate in character, was affirmed.

is, the power to prescribe the rules by which it shall be governed, is vested in Congress, and when Congress has enacted a statute such as the one in question, any agreement or combination which directly operates, not alone upon the manufacture, but upon the sale, transportation and delivery of an article of interstate commerce, by preventing or restricting its sale, etc., thereby regulates interstate commerce to that extent, and to the same extent trenches upon the power of the national legislature and violates the statute.”¹

¹ In the recent case of *Gibbs v. McNeeley*, 107 Fed. 211 (1901), the Court considered and distinguished between the principles and cases stated in the text: “In the case of *United States v. E. C. Knight Co.*, 156 U. S. 1 (1895), (15 Sup. Ct. Rep. 249), the Supreme Court held that, although the American Sugar Refining Company had obtained a practical monopoly of the business of manufacturing sugar, yet the act of Congress did not touch the case, because the combination only related to manufacture, and not to commerce among the States or foreign countries; that a combination which directly related to manufacture only was not brought within the purview of the act, although, as an indirect and incidental result of such combination, commerce among the States might be thereafter somewhat affected. The Court in that case says: ‘The fact that an article is manufactured for export to another State, does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce.’ In the more recent case of *Addyston Pipe, etc. Co. v. United States*, 175 U. S. 239 (1899), (20 Sup. Ct. Rep. 96), the principle was recognized, that a combination to control manufacture is not a violation of the Act of Congress, since such a combination does not directly control or effect interstate commerce. The Court distin-

guished such a combination from one having for its object the sale and transportation to other States of specific articles. Combinations of the latter class are held to be proper subjects of regulation, because they enter into such commerce. To which class does the case on trial belong? Plaintiff contends that, inasmuch as the combination under consideration controls not only the manufacture, but the sale, of the manufactured product, this case belongs to the latter class; that defendants’ combination affects interstate commerce, and is, therefore, made unlawful by the Act of Congress. The reason why the manufacture within a State of an article of commerce is not within the purview of the act, although the manufacturing combination constitutes a monopoly, being that it involves nothing in the way of interstate commerce, does it alter the case that the combination includes the sale of its product among its objects? I am of the opinion that it does not; that the lawfulness of what is done depends upon the place directly affected, and not upon the character in other respects of what is done. It makes no difference that the manufacturer intends his product for sale in other States and foreign countries. Such an intention does not alter the character of the combination to manufacture, and upon this principle it makes no difference that the contract or combination is for the manufacture and sale of specific articles. It must go further, and provide

§ 390. **Combination must have Direct Effect upon Interstate Commerce — (C) Restraints upon Facilities for Commerce.** — As already shown, the combination condemned by the anti-trust act is one whose direct and immediate effect is a restraint upon interstate commerce. In thus applying the statute, a distinction is drawn between a combination or contract which directly affects and interferes with interstate commerce, and one which relates to a local facility provided in furtherance and aid of such commerce. These facilities may consist of privileges and conveniences provided and made use of, and services rendered, in aid of commerce, as well as in the use of tangible property. Such facilities are not, in themselves, a part of interstate commerce, and touch it only in an indirect way. Charges for such facilities are not a restraint upon interstate commerce, although the cost of conducting an interstate business may be thereby increased; and agreements or combinations relating to the amount of such charges or the furnishing of such facilities are not in contravention of the federal statute, however much they may offend against public policy or local law.¹

These principles are stated and illustrated in the case of *Hopkins v. United States*,² decided by the Supreme Court

for the sale and transportation to other States of the specific articles; otherwise, what is proposed cannot be said to look to interstate commerce. Mere State commerce is a matter of State control."

¹ *Hopkins v. United States*, 171 U. S. 578 (1898), (19 Sup. Ct. Rep. 40); *Anderson v. United States*, 171 U. S. 604 (1898), (19 Sup. Ct. Rep. 50).

² *Hopkins v. United States*, 171 U. S. 590 (1898), (19 Sup. Ct. Rep. 40). The following is a summary of the facts in this case: The Kansas City Live Stock Exchange was a voluntary association doing business at the stockyards in Kansas City. The business of its members was to receive, individually, consignments of live stock from owners living in different States, to feed the stock and prepare it for the market; to sell it, re-

ceive the price and remit the proceeds, after deducting commissions, advances and expenses, to the owners. The members solicited consignments and made advances thereon. The rules of the association forbade members from buying stock of merchants in Kansas City, not members of the exchange, fixed commissions, and provided that no member should do business with any person violating the rules. The stockyards were situated partly in Missouri and partly in Kansas, but this fact was deemed unimportant by all the courts.

Bill by the United States against Hopkins, and other members of the association, was filed, charging that the association was in violation of the act of July 2, 1890, and praying for an injunction. The trial court granted the

of the United States, which related to an association of commission men for the purpose, primarily, of regulating the sale of live stock upon its arrival at stockyards. Mr. Justice Peckham said: "The selling of an article at its destination, which has been sent from another State, while it may be regarded as an interstate sale and one which the importer was entitled to make, yet the services of the individual employed at the place where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce, and a combination in regard to the amount to be charged for such service is not, therefore, a combination in restraint of that trade or commerce. . . . Charges for services of this nature do not immediately touch or act upon, nor do they directly affect, the subject of the transportation. Indirectly, and as an incident, they may enhance the cost to the owner of the cattle in finding a market, or they may add to the price paid by the purchaser, but they are not charges which are directly laid upon the article in the course of transportation and which are charges upon the commerce itself; they are charges for the facilities given or provided the owner in the course of the movement from the home *situs* of the article to the place and point where it is sold. . . . If charges of the nature described do not amount to a regulation of interstate trade or commerce because they touch it only in an indirect and remote way, or else because they are in the nature of compensation for the use of property or privileges as a mere facility for that commerce, it would, for a like reason, seem clear that agreements relating to the amounts of charges among those who furnish the privileges or facilities are not in restraint of that kind of trade. While the indirect effect of the agreements may be to enhance the expenses of those engaged in the business, yet as the agreements are in regard to compensation for privileges accorded and for services ren-

injunction (82 Fed. 529 (1897)), and the case came by certiorari from the Circuit Court of Appeals to the Supreme Court, which reversed the decree. See

also *Green v. Stoller*, 77 Fed. 1 (1896), which related to the Kansas City Live Stock Exchange.

dered as a facility to commerce or trade, they are not illegal as a restraint thereon."

§ 391. **Combination must have Direct Effect upon Interstate Commerce — (D) Exchanges and Similar Associations.** — Upon the principle stated in the preceding sections, that, in order to come within the provisions of the federal statute, the direct effect of a combination must be in restraint of interstate commerce, it follows that a voluntary association or "exchange" formed by dealers in articles of a similar nature in a particular locality for the purpose of fairly regulating the methods of conducting business and establishing a general headquarters, and the by-laws of which provide rules for fair dealing among the members, but which exercises no control over prices or production, is not in contravention of the statute.¹ Neither the object nor consequence of such an

¹ *Anderson v. United States*, 171 U. S. 604 (1898), (19 Sup. Ct. Rep. 50) *Hopkins v. United States*, 171 U. S. 578 (1898), (19 Sup. Ct. Rep. 40).

In the *Anderson* case, the Traders' Live Stock Exchange was a voluntary association in Kansas City, whose members carried on much the same business, and in the same manner, as that carried on by members of the Kansas City Live Stock Exchange passed upon in the *Hopkins* case (*ante*, § 390, *note*). The principal difference was that the members of the Traders' Exchange were themselves purchasers of cattle in the market, while the members of the other association sold cattle upon commission. In holding that the association did not violate the anti-trust act, the Supreme Court of the United States (*per* Peckham, J.) said (p. 616): "From very early times it has been the custom for men engaged in the business of buying and selling articles of a similar nature, at any particular place, to associate themselves together. The object of the association has, in many cases, been to provide for the ready transaction of the business of the associates by obtaining a general headquarters for its conduct, and thus to ensure

a quick and certain market for the sale or purchase of the article dealt in. Another purpose has been to provide a standard of business integrity among the members by adopting rules for just and fair dealing among them, and enforcing the same by penalties for their violation. The agreements have been voluntary, and the penalties have been enforced under the supervision and by the members of the association. The preamble adopted by the association in this case shows the ostensible purpose of its formation. It was not formed for pecuniary profits, and a careful perusal of the whole agreement fails, as we think, to show that its purpose was other than as stated in the preamble, and that the result naturally to be expected from an enforcement of the rules would not directly, if at all, affect interstate trade or commerce."

The Court then distinguished the agreement in question from those in *United States v. Jellico Mountain Coal, etc. Co.*, 46 Fed. 432 (1891); *United States v. Coal Dealers Ass'n*, 85 Fed. 252 (1898), and *United States v. Addyston Pipe, etc. Co.*, 85 Fed. 271 (1898), (*affirmed* 175 U. S. 211) (1899), (20 Sup. Ct. Rep. 96), upon the ground

association is to suppress competition, and its effect upon interstate commerce, if any, is remote.

§ 392. **Statute applies to Combinations of Railroad Companies and other Carriers.** — The statute declares illegal *every* contract, combination, or conspiracy in restraint of commerce among the several States. Railroad companies and other carriers engaged in transporting persons and property between different States are engaged in interstate commerce,¹ and any contract or combination between competing carriers for the purpose of maintaining rates or preventing competition, directly restrains interstate commerce and contravenes the federal statute.²

that the agreements in all those cases provided for fixing the prices of the articles dealt in. In comparing these cases, also note *United States v. Chesapeake, etc. Fuel Co.*, 105 Fed. 93 (1900), *affirmed* 115 Fed. 610 (1902); *Lowry v. Tile, etc. Assoc.*, 106 Fed. 38 (1900).

¹ *United States v. Joint Traffic Ass'n*, 171 U. S. 570 (1898), (20 Sup. Ct. Rep. 96): "The business of a railroad carrier is of a public nature, and in performing it the carrier is also performing, to a certain extent, a function of government which, as counsel observed, requires them to perform the service on equal terms to all. This public service, that of transportation of passengers and freight, is a part of trade and commerce, and when transported between States, such commerce becomes what is described as interstate, and comes, to a certain extent, under the jurisdiction of Congress, by virtue of its power to regulate commerce among the several States."

² *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290 (1897), (17 Sup. Ct. Rep. 540); *United States v. Joint Traffic Ass'n*, 171 U. S. 505 (1898), (19 Sup. Ct. Rep. 25). The nature of an agreement between carriers which falls within the provisions of the federal anti-trust act, cannot be better illustrated than by outlining the

traffic arrangements involved in these two leading cases.

In the *Trans-Missouri Case* it appeared that eighteen competing Western railroad companies formed, in 1889, a voluntary association called the "Trans-Missouri Freight Association," for the purpose, as stated in the agreement, "of mutual protection by establishing and maintaining reasonable rates, rules and regulations, on all freight traffic, both through and local." The agreement provided for electing a chairman of the association, and representatives of each company to vote in its behalf at the monthly meetings of the association; for appointing a committee to establish traffic rates and regulations, "and to make *rules for meeting the competition of outside lines*;" for changing rates; for arranging with connecting lines when authorized by the association, and for imposing and enforcing the penalties prescribed for infractions of the agreement.

Bill by the United States for dissolution of the association, and for an injunction, on the ground that the agreement violated the act of July 2, 1890, was missed by the Circuit Court (53 Fed. 440 (1892)). This decree was affirmed by the Circuit Court of Appeals (58 Fed. 58 (1893)), but was reversed by the Supreme Court.

In the *Joint Traffic Association Case*

In *United States v. Trans-Missouri Freight Association*,¹ the Supreme Court of the United States said: "Congress has, so far as its jurisdiction extends, prohibited all contracts or combinations in the form of trusts entered into for the purpose of restraining trade and commerce. The results naturally flowing from a contract or combination in restraint of trade or commerce, when entered into by a manufacturing or trading company, such as above stated, while differing somewhat from those which may follow a contract to keep up transportation rates by railroads, are nevertheless of the same nature and kind, and the contracts, themselves, do not so far differ in their nature that they may not all be treated alike and be condemned in common. It is entirely appropriate, generally, to subject corporations or persons engaged in trading or manufacturing to different rules from those applicable to railroads in their transportation business; but when the evil to be remedied is similar in both kinds of corporations, such as contracts which are unquestionably in restraint of trade, we see no reason why similar rules should not be promulgated in regard to both, and both be covered in the same statute by general language sufficiently broad to include them both. We see nothing either in contemporaneous history, in the legal situation at the time of the passage of the statute, in its legislative history, or in any general difference in the nature or kind of these trading or manufacturing companies, which would lead us to the

it appeared that thirty-one railroad companies engaged in transportation between Chicago and the Atlantic Coast, formed a voluntary association called the Joint Traffic Association, by which they agreed that the association should have jurisdiction over all competitive traffic, with certain exceptions, passing through the western termini of the trunk lines and certain other points, and to fix the rates, fares and charges therefor, and to change the same, and no party to the agreement was permitted to deviate from the rates so fixed. The agreement also provided for the appointment of managers of the

association; that the powers conferred upon the managers should be exercised in conformity to the provisions of the interstate commerce act, and that the managers should have power to deal with connecting companies, not parties to the agreement, which declined to observe the established rates. Bill by the United States was dismissed by the Circuit Court (76 Fed. 895); the decree was affirmed by the Circuit Court of Appeals, without opinion (89 Fed. 1020), but was reversed by the Supreme Court.

¹ *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 324 (1897), (17 Sup. Ct. Rep. 540).

conclusion that it cannot be supposed the legislature, in prohibiting the making of contracts in restraint of trade, intended to include railroads within the purview of that act.”¹

The conclusion that the statute applies to combinations of railroads unavoidably follows from the premise that *all* combinations in restraint of interstate commerce violate its provisions. In reaching this conclusion, however, the Supreme Court in the *Trans-Missouri Freight Association Case* was met by two contentions:

First. “That the debates in Congress show beyond a doubt that the act as passed does not include railroads.” But after reviewing the debates referred to, Mr. Justice Peckham said: “All that can be determined from the debates and reports is, that various members had various views, and we are left to determine the meaning of this act, as we determine the meaning of other acts, from the language used therein.”²

Second. That the statute did not apply to traffic contracts between railroad companies, because they were authorized by the interstate commerce act, and that a construction should not be adopted which would repeal, by implication, any provision of that act. Mr. Justice Peckham, however, said: “The first answer to this argument is that, in our opinion, the commerce act does not authorize an agreement of this nature. It may not in terms prohibit, but it is far from conferring, either directly or by implication, any authority to make it. If the agreement be legal, it does not owe its validity to any provision of the commerce act, and if illegal,

¹ The Court also said (p. 340): “If the law prohibits any contract or combination in restraint of trade or commerce, a contract or combination made in violation of such law is void, whatever may have been theretofore decided by the courts to have been the public policy of the country on that subject. The conclusion which we have drawn from the examination above made into the question before us is that the anti-

trust act applies to railroads, and that it renders illegal all agreements which are in restraint of trade or commerce as we have above defined that expression; and the question then arises whether the agreement before us is of that nature.”

² *United States v. Trans-Missouri Freight Ass’n*, 166 U. S. 318 (1897), (17 Sup. Ct. Rep. 540).

it is not made so by that act. The fifth section prohibits what is termed "pooling," but there is no express provision in the act prohibiting the maintenance of traffic rates among competing roads by making such an agreement as this, nor is there any provision which permits it. . . . As the commerce act does not authorize this agreement, argument against a repeal by implication of the provisions of the act which, it is alleged, grant such authority becomes ineffective. There is no repeal in the case and both statutes may stand, as neither is inconsistent with the other."¹

While traffic associations and other combinations between competing carriers for the purpose of maintaining rates, or otherwise controlling or regulating competition, are in violation of the federal statute, it has been held that an agreement between connecting railroad companies for the reception and forwarding of freight beyond their own lines, does not fall within the provision of the statute;² nor is this result altered by the fact that special facilities, in the way of advancement of freight charges, may be granted.³ Upon similar principles, it was held that a custom or usage existing among several express companies for mutual advantage, for a receiving company to pay accrued charges on goods, or transport them to their destination without prepayment of charges, was not prohibited by the statute.⁴

In determining whether a particular combination of carriers comes within the provisions of the statute, the intent of the parties in entering it is not important. The essential question is one of law, in regard to the meaning and effect

¹ *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 314 (1897), (17 Sup. Ct. Rep. 540).

² *Prescott, etc. R. Co. v. Atchison, etc. R. Co.*, 73 Fed. 438 (1896). The conclusion of the Court in this case, that the agreement in question did not contravene the provisions of the federal anti-trust act, is probably well founded, but the reasons stated for so holding, that that act "is directed solely against contracts which would have been unlawful before the passage of the act," is

directly opposed to the ruling of the Supreme Court in the *Trans-Missouri* case (*ante*, § 387), which was announced after the decision in this case. The true reason for holding the agreement not in contravention of the statute would seem to be that it was not in restraint of trade or commerce.

³ *Gulf, etc. R. Co. v. Miami Steamship Co.*, 86 Fed. 407 (1898).

⁴ *Southern Indiana Exp. Co. v. United States Exp. Co.*, 88 Fed. 659 (1898), *affirmed* 92 Fed. 1022 (1899).

of the combination agreement. *Does the agreement restrain trade or commerce in any way?*¹

§ 393. **Form of Combination immaterial. Illegality of Corporate Device.** — In the *Trans-Missouri Freight Association Case* it was urged that the federal statute was inapplicable to an association of railroad companies for the purpose of regulating traffic rates, because the language, “every contract, combination in the form of trust or otherwise,” covers only contracts or combinations in the trust form or those which, while not exactly trusts, are of a similar form or nature. But the Supreme Court of the United States said:² “This is clearly not so. While the statute prohibits all combinations in the form of trust or otherwise, the limitation is not confined to that form alone. All combinations which are in restraint of trade or commerce are prohibited, whether in the form of trusts or in any other form whatever.”

Every contract, combination or conspiracy in restraint of interstate or foreign commerce is illegal. The method adopted in bringing about the combination is immaterial; and the device of a holding corporation for the purpose of circumventing the law can be no more effectual than any other means. While a corporation, in the legitimate exercise of power conferred, may purchase and hold the shares of other corporations, the formation of a holding corporation, *as a part of a scheme* to bring about a combination of competing railroad companies — a practical consolidation through the pooling of earnings and virtual pooling of stocks

¹ *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 341 (1897), (17 Sup. Ct. Rep. 540).

² *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 326 (1897), (17 Sup. Ct. Rep. 540); *United States v. Debs*, 64 Fed. 747 (1894): “It is therefore the privilege and duty of the court, uncontrolled by considerations drawn from other sources, to find the meaning of the statute in the terms of its provisions, interpreted by the settled rules of construction. That the original design to suppress trusts and monop-

lies created by contract or combination in the form of trust, which of course would be of a ‘contractual character,’ was adhered to, is clear; but it is equally clear that a further and more comprehensive purpose came to be entertained, and was embodied in the final form of the enactment. Combinations are condemned, not only when they take the form of trusts, but in whatever form found, if they be in restraint of trade. That is the effect of the words ‘or otherwise.’”

—in restraint of interstate or foreign commerce, seems clearly in violation of the provisions of the statute.¹

§ 394. **Statute inapplicable to State's Monopoly and to Monopoly under Patent.** — The statute declares that every person who monopolizes interstate trade or commerce shall be deemed guilty of a misdemeanor, and that the word "person" includes "corporations" and "associations." A State, however, is neither a person, corporation nor association, and the statute is inapplicable to a monopoly maintained by a State.²

Conditions imposed by a patentee in a license to manufacture a patented article which tend to keep up the monopoly and maintain prices, and an agreement not to grant similar licenses to other persons, are not in contravention of the statute. The monopoly results from the patent and not from the agreement.³

§ 395. **Statute not retroactive but applies to Continuing Combinations.** — While the federal statute is not retroactive,⁴ it applies to combinations continued in force after its enactment.⁵ Although a combination may have been lawful when formed, its continuation after it has been declared illegal becomes a violation of the act. The statute is not of an *ex post facto* nature, but the legal effect of its enactment was to prohibit the continuance of existing combinations in contravention of its provisions, and the formation of such combinations in the future.

¹ The principles of public policy regarding the purchase by one corporation of stock in another for the purpose of extinguishing competition, while not directly in point, are not without some bearing in determining the validity of a holding corporation of the character indicated. For a consideration of these principles, see *ante*, § 292: "*Holding Stock to prevent Competition.*"

² *Lowenstein v. Evans*, 69 Fed. 908

(1895), holding that the federal anti-trust act was inapplicable to the State of South Carolina which, by its laws, assumed a complete monopoly of the traffic in intoxicating liquors.

³ *Bement v. National Harrow Co.*, 22 Sup. Ct. Rep. 747 (1902).

⁴ *In re Greene*, 52 Fed. 112 (1892).

⁵ *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 342 (1897), (17 Sup. Ct. Rep. 540).

CHAPTER XL.

RIGHTS, REMEDIES AND PROCEDURE UNDER FEDERAL STATUTE.

- § 396. Invalidity under Federal Statute as a Ground of Collateral Attack.
- § 397. Injunctive Relief Remedy of Government only.
- § 398. Actions by Government to enforce Forfeitures.
- § 399. Criminal Proceedings — Indictments.
- § 400. Actions at Law by Private Persons — Damages.
- § 401. Illegality of Combination must be shown — Evidence.
- § 402. Parties Defendant.
- § 403. Effect of Voluntary Dissolution of Combination pending Proceedings.
- § 404. Limitations of Actions.

§ 396. **Invalidity under Federal Statute as a Ground of Collateral Attack.** — Upon principles elsewhere stated in reference to illegal combinations in general,¹ the fact that one of the parties to an agreement may be a combination in violation of the federal statute cannot be invoked collaterally to affect, in any manner, its independent contractual obligations or rights.² Parties dealing with the combination

¹ See *ante*, § 369: "*Collateral Attack upon Combination. Remedies upon Independent Contracts.*" Reference should be had to this section for consideration of general principles, applicable as well to combinations in violation of the federal statute as to those inimical to public policy.

² One who requests and accepts the services of a tug for towage purposes cannot escape paying the reasonable value of the services rendered, on the ground that the owners of the tug were members of a combination in violation of the federal statute. *The Charles E. Wiswall*, 86 Fed. 671 (1898), *affirming* 74 Fed. 802 (1896). In this case, however, the Court held that the combination was *not* in restraint of interstate commerce so as to come within the condemnation of the statute.

A note for a balance of account cannot be avoided on the ground that the payee is an unlawful combination con-

trary to the anti-trust act. *Union Sewer Pipe Co. v. Connolly*, 99 Fed. 354 (1900). In affirming the decision in this case (*sub nom.* *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 550 (1902)), the Supreme Court of the United States said: "If the contract between plaintiff corporation and the other named corporations, persons and companies, or the combination thereby formed, was illegal under the act of Congress, then all those, whether persons, corporations or associations, directly connected therewith, became subject to the penalties prescribed by Congress. But the act does not declare illegal or void any sale made by such combination, or by its agents, of property it acquired or which came into its possession for the purpose of being sold, such property not being, at the time, in the course of transportation from one State to another or to a foreign country. The buyer could not refuse to comply with his contract of

cannot set up its illegality as a defence to demands not connected with the illegal transaction and not dependent upon it for enforcement.

Conversely, when the combination must establish its claim through the illegal transaction, it will fail. Clean hands are essential in a court of equity, and a combination in violation of the anti-trust law cannot invoke the aid of a court of equity for the protection of its rights under contracts entered into as the direct result of the unlawful combination.¹

purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode prescribed by the act of Congress; for Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies and firms. The contracts under which the pipe in question was sold were, as already said, collateral to the arrangement for the combination referred to, and this is not an action to enforce the terms of such arrangement. That combination may have been illegal, and yet the sale to the defendants was valid."

¹ In *Delaware, etc. R. Co. v. Frank*, 110 Fed. 689 (1901), a suit by a railroad company to enjoin the defendants, who were ticket brokers, from dealing in special tickets issued on account of the Pan-American Exposition, which were by their terms non-transferable, it appeared, on hearing of motion for preliminary injunction, that complainant was a member of a combination known as the "Trunk Line Association," formed by a number of railroads operating in different States for the purpose of preventing competition; that passenger receipts were pooled and divided on an

agreed basis; and that the special rates made on account of the Exposition were fixed, and the terms of the ticket which were the basis of the suit prescribed, by such association. Judge Hazen held that such association was in violation of the federal anti-trust law and said: "The defendants do not deny the charges of wrong-doing. . . . But can the aid of a federal tribunal be invoked to protect the complainant in the issuance of a ticket over its railroad, which, as far as it appears to the court, is the culmination as well as the evidence of an agreement between railroad corporations specifically forbidden by an act of Congress which has been sustained by the Supreme Court of the United States? . . . The complainant contends that this charge made by the defendant does not avail, as the wrong-doing, if any exists, does not relate to the subject matter. I am not convinced as to the soundness of this contention. Can the railroad complainant conspire unlawfully to fix rates, and then come into a court of equity and invoke its aid to protect those rates which are represented by the ticket presented to the court, and which is wrongfully used by the defendants? The evil practice which stands admitted by the papers is the very practice for which the court's protection is invoked."

In *Bement v. National Harrow Co.*, 22 Sup. Ct. Rep. 754 (1902), the Supreme Court of the United States said: "The plaintiff contends, in the first place, that

§ 397. **Injunctive Relief Remedy of Government only.** — The first three sections of the statute declare certain acts and agreements criminal offences against the United States. The fourth section confers jurisdiction upon the circuit courts of the United States to restrain violations of the act, and declares it to be the duty of the several district attorneys “under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations.” The fifth section provides for the citing in of additional parties, the sixth, for the forfeiture to the United States of certain property in course of transportation, and the eighth states a rule of construction. The only remedy afforded a private person is provided in the seventh section, which gives a party injured the right to recover threefold damages, costs and attorney’s fees.¹ The statute, being penal

only the Attorney-General of the United States can bring an action under the statute, excepting that by section 7 of the act any person injured in his business or property, as provided for therein, may himself sue in any circuit court of the United States in the district in which the defendant resides or is found. Assuming that the plaintiff is right so far as regards any suit brought under that act, we are nevertheless of opinion that any one sued upon a contract may set up as a defence that it is a violation of the act of Congress, and, if found to be so, that fact will constitute a good defence to the action.”

¹ *Greer v. Stoller*, 77 Fed. 2 (1896), (*per Philips, J.*): “Can a private citizen for a redress of a private grievance, maintain a bill in equity for an injunction under this act? The things forbidden by the act are declared to be criminal offences against the government of the United States. By the fourth section, the jurisdiction is conferred upon the circuit courts of the United States to prevent and restrain the violations of this act, ‘and it shall be the duty of the several district attorneys of the United States in their respective districts, under the direction of the

Attorney-General, to institute proceedings in equity to prevent and restrain such violations; such proceedings may be by way of petition setting forth the case and praying that such violations shall be enjoined or otherwise prohibited.’ Section 7 gives to the private person ‘injured in his business or property by any other person or corporation by reason of anything forbidden, or declared to be unlawful by this act,’ a right to sue in a circuit court of the United States in the district in which the defendant resides or is found for threefold damages by him sustained. The statute, being highly penal in its character, must be strictly construed; and, having created a new offence, and imposed new liabilities, and having provided the modes of redress to the public and the private citizen, by established rules of construction, these remedies are inclusive of all others. *Suth. St. Const.* §§ 392-394; *Riddick v. Governor*, 1 Mo. 147 (1821); *Stafford v. Ingersol*, 3 Hill (N. Y.), 38 (1842); *Chandler v. Hanna*, 73 Ala. 390 (1882). While there has been some contrariety of opinion among judges as to whether or not the right of injunction to a private

in its nature, must be strictly construed. It imposes new liabilities and provides particular modes of redress, both for the public and the individual, and the methods so prescribed are exclusive. The United States, through its district attorneys, has the sole power to maintain a bill for an injunction to prevent a violation of the statute, and the only remedy of the individual is that provided by the statute.¹

In proceedings for injunctive relief it is provided that a petition shall be filed setting forth the case, and praying that the alleged violation of the law may be enjoined or otherwise prohibited; that, after notice to the parties complained of, the court shall proceed as soon as may be to hear and determine the case, and that, pending petition and before final decree, it may make such temporary restraining order as may be just. In construing these provisions, it has been held that a restraining order may be issued without notice where, on account of the exigencies of the case, notice might

citizen is accorded by this statute, my conclusion is that the right is limited by the fourth section to injunction at the relation of the district attorney, and that the seventh section gives to the private citizen his only remedy."

Southern Indiana Exp. Co. v. United States Exp. Co., 88 Fed. 663 (1898), (*affirmed* 92 Fed. 1022), (1899): "The anti-trust law of July 2, 1890, has wrought no such change in the law as will enable the court to enforce its provisions in favor of a private party by a bill in equity. Under this act, the only remedy given to any other party than the government of the United States in an action at law for threefold damages, with costs and attorney's fees, and the only party entitled to maintain a bill in equity for injunctive relief for an alleged violation of its provisions is the United States by its district attorney, on the authorization of its attorney-general."

See also *Metcalf v. American School-Furniture Co.*, 108 Fed. 909 (1901); *Block v. Standard Distilling, etc. Co.*,

95 Fed. 978 (1899); *Gulf, etc. R. Co. v. Miami Steamship Co.*, 86 Fed. 407 (1898); *Pidcock v. Harrington*, 64 Fed. 821 (1894); *Hagan v. Blindell*, 56 Fed. 696 (1893); *affirming Blindell v. Hagan*, 54 Fed. 40 (1893).

¹ *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 342 (1897), (17 Sup. Ct. Rep. 540): "It is urged that the United States have no standing in court to maintain this bill; that they have no pecuniary interest in the result of the litigation or in the question to be decided by the court. We think that the fourth section of the act invests the government with full power and authority to bring such an action as this, and if the facts are proved, an injunction should issue. Congress having the control of interstate commerce, has also the duty of protecting it, and it is entirely competent for that body to give the remedy by injunction as more efficient than any other civil remedy." See also *In re Debs*, 158 U. S. 564 (1895), (15 Sup. Ct. Rep. 900).

be dispensed with according to established usages of equity practice.¹

§ 398. **Actions by Government to enforce Forfeiture.** — The sixth section of the act provides for the forfeiture to the United States of property owned by an unlawful combination while in course of transportation from one State to another. The method of procedure under this statute follows that provided for the forfeiture, seizure and condemnation of property unlawfully imported into the United States, and involves a trial by jury. There can be no seizure in a suit in equity for an injunction under the fourth section of the act.²

The locomotives and cars of a railroad carrier are not subject to forfeiture because it transports property shipped in violation of the statute. Simple transportation is not a contract, combination or conspiracy.³

§ 399. **Criminal Proceedings. Indictments.** — The first and third sections of the federal anti-trust statute in declaring

¹ *United States v. Coal Dealer's Ass'n*, 85 Fed. 252 (1898).

² *United States v. Addyston Pipe, etc. Co.*, 85 Fed. 271 (1898).

³ *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 313 (1897), (17 Sup. Ct. Rep. 540): "Nor do we think that because the sixth section does not forfeit the property of the railroad company when merely engaged in the transportation of property owned under and which was the subject of a contract or combination mentioned in the first section, any ground is shown for holding the rest of the act inapplicable to carriers by railroad. It is not perceived why, if the rest of the act were intended to apply to such a carrier, the sixth section ought necessarily to have provided for the seizure and condemnation of the locomotives and cars of the carrier engaged in the transportation between the States of those articles of commerce owned as stated in that sixth section. There is some justice and propriety in forfeiting those articles, but we see

none in forfeiting the locomotives or cars of the carrier simply because such carrier was transporting articles as described from one State to another, even though the carrier knew that they had been manufactured or sold under a contract or combination in violation of the act. In the case of simple transportation of such articles the carrier would be guilty of no violation of any of the provisions of the act. Why, therefore, would it follow that the sixth section should provide for the forfeiture of the property of the carrier if the rest of the act were intended to apply to it? To subject the locomotives and cars to forfeiture under such circumstances might also cause great confusion to the general business of the carrier, and, in that way, inflict unmerited punishment upon the innocent owners of other property in the course of transportation in the same cars and drawn by the same locomotives. If the company itself violates the act, the penalties are sufficient as provided for therein."

contracts in restraint of interstate and interterritorial trade or commerce not only illegal, but criminal offences against the United States, punishable by fine and imprisonment, go a step beyond the common law. Contracts in restraint of trade, while illegal at common law as being contrary to public policy, were not criminal or indictable.¹ The other provisions of these sections, however, directed against combinations and conspiracies in restraint of interstate commerce, and the second section, imposing a penalty upon persons monopolizing or attempting, combining or conspiring to monopolize such commerce, cover offences — criminal conspiracies and monopolies — known to the common law, and impose new and additional penalties upon persons committing them when affecting interstate commerce.

The statute does not define what constitutes a contract, combination or conspiracy in restraint of trade or commerce, or what the term "monopolize" means, and recourse must be had to the common law and outside sources to obtain the proper definitions of these terms. The statute fails, moreover, to set forth all the elements necessary to constitute the several offences, and an indictment simply following the language of the statute, without stating the particular acts of the accused, would be wholly insufficient.² An indictment under this statute must, therefore, be tested by the specific acts alleged to have been done or committed; and it must be distinctly averred that, by means of such acts, the designated offence against the freedom of interstate commerce was committed.³

The statute applies to corporations as well as to persons, and an indictment charging a stockholder with the acts of his corporation is fatally defective.⁴

§ 400. **Actions at Law by Private Persons — Damages.** — As already indicated, the only remedy provided for an individual

¹ *In re Greene*, 52 Fed. 104 (1892). (1892); *United States v. Nelson*, 52

² *In re Greene*, 52 Fed. 104 (1892); *United States v. Nelson*, 52 Fed. 646 (1892); *In re Greene*, 52 Fed. 104 (1892); *United States v. Patterson*, 55 Fed. 605 (1893). See also *In re Terrell*, 51 Fed. 213 (1892).

³ *United States v. Greenhut*, 50 Fed. 469 (1892); *In re Corning*, 51 Fed. 205

⁴ *In re Greene*, 52 Fed. 104 (1892).

injured by reason of anything forbidden or declared to be unlawful by the federal statute is an action at law, under the seventh section, for the recovery of threefold damages, costs and attorney's fees.¹ Such an action may be brought in any circuit court of the United States, in the district in which the defendant resides or is found, without regard to the amount in controversy.

In order to obtain a recovery, it is necessary for a plaintiff to show:

(1) That the defendants have entered into a combination or conspiracy to restrain or monopolize interstate or foreign commerce.²

(2) That he has been injured in his business or property by reason of the acts of the defendants in pursuance of such combination or conspiracy.³

(3) That the injury has involved actual, and not merely speculative, damage to his business or property.⁴

¹ For consideration of constitutionality of a provision for the recovery of attorney's fees, see *In re Grice*, 79 Fed. 627 (1897).

² *Gibbs v. McNeeley*, 102 Fed. 599 (1900). In an action for damages under the statute a complaint is demurrable which fails to aver that the acts of the defendants complained of have some connection with a contract or combination in restraint of interstate commerce. *Bishop v. American Preservers Co.*, 51 Fed. 272 (1892), (*affirmed* 105 Fed. 845 (1900)).

³ *Gibbs v. McNeeley*, 102 Fed. 599 (1900); *Lowry v. Tile, etc. Ass'n*, 106 Fed. 38 (1900), (*affirming* 98 Fed. 817 (1899)).

Section 7 of the act does not authorize an action against an alleged trust or combination, by one who was a party to its organization and a stockholder therein, to recover damages resulting from the enforcement by defendant of rights given it by the alleged unlawful agreement. *Bishop v. American Preservers Co.*, 105 Fed. 845 (1900), (*affirming* 51 Fed. 272 (1892)).

⁴ In *Lowry v. Tile, etc. Ass'n*, 106 Fed. 46 (1900), an action for the recovery of damages under the federal statute, Judge Morrow charged the jury as follows: "Under these instructions, there is left for your consideration the single question of damages; and, under the provisions of the statute, if you find that the plaintiffs have been injured in their business by reason of this unlawful combination and association of the defendants, you will find for the plaintiffs in such a sum as will be equivalent to and represent the actual damages sustained by the plaintiffs. It is for the court, in executing the provisions of the statute in entering judgment upon the verdict (if you shall find for the plaintiffs), to treble the amount of the damages; that is to say, any verdict rendered by you, and upon which judgment will be entered by the court, will be multiplied by three, and a judgment entered for such treble damages. Your verdict will, however, be limited to the actual damages which the evidence shows the plaintiffs have sustained by reason of the acts of the defendants in

§ 401. **Illegality of Combination must be shown—Evidence.**—In determining whether a particular contract or combination comes within the provisions of the federal statute, illegality is not to be presumed but must be proved.¹ It must be shown that the agreement, or the method of doing business thereunder, is in violation of the statute. Where the necessary effect of an agreement, as shown upon its face, is to restrain interstate trade or commerce, the combination thereunder is illegal, and the question of the intent of the parties, in entering into it, is immaterial.²

violation of the act of Congress. The sole question, then, as to damages, in this case, relates to an injury which the plaintiffs may have sustained in their business by reason of the association in question. It is not enough, in an action of this kind, which is one at law, for the plaintiffs to establish the existence of an association which comes within the inhibition of the act of Congress. Plaintiffs must go still further, and the burden of proof is upon them to show some real and actual damage to their business by reason of such an association. There is no duty imposed by the law upon the association, even if within the statute, to show that its acts have not worked injury to the business of plaintiffs. On the contrary, the duty and burden of proving damage to their business is imposed by law upon the plaintiffs, and, unless they prove this damage to their business by a preponderance of evidence the verdict must be for the defendants. Mere speculation as to the possible profits of a mercantile business, in the absence of evidence directed to such conditions, cannot be indulged in by the jury for purposes of finding a verdict in damages. The damages which the law contemplates, and which the act of Congress provides for, must be reasonable damages ascertainable upon the evidence presented in the case. There must be facts, transactions, actual evidence of some material and pertinent character, relating to a business from which the jury can ascertain with rea-

sonable certainty that damage has actually been worked to such business, before any verdict in damages can be returned, other than nominal damages."

See also *Gibbs v. McNeeley*, 102 Fed. 599 (1900).

¹ *United States v. Addyston Pipe, etc. Co.*, 78 Fed. 723 (1897), (*reversed* 85 Fed. 271) (1898), 175 U. S. 211 (1899), (20 Sup. Ct. Rep. 96); *United States v. Trans-Missouri Freight Ass'n*, 58 Fed. 58 (1893), (*reversed* 166 U. S. 341) (1897), (17 Sup. Ct. Rep. 540). The reversal of the judgments of the lower courts in these cases in no way affects the principle stated in the text.

² *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 341 (1897), (17 Sup. Ct. Rep. 540): "Although the case is heard on bill and answer, thus making it necessary to assume the truth of the allegations in the answer which are well pleaded, yet the legal effect of the agreement itself cannot be altered by the answer, nor can its violation of law be made valid by allegations of good intention or of desire to simply maintain reasonable rates; nor can the plaintiffs' allegations as to the intent with which the agreement was entered into be regarded, as such intent is denied on the part of the defendants. And if the intent alleged in the bill were a necessary fact to be proved in order to maintain the suit, the bill would have to be dismissed. In the view we have taken of the question, the intent alleged by the government is not necessary to be

Where the agreement, itself, does not establish the illegality of the combination, it may be shown by all the facts and circumstances of the case; and the practical working and effect of the defendant's methods of doing business may properly be considered.¹

In *Addyston Pipe, etc. Co. v. United States* the Supreme Court of the United States said: "It is the effect of the combination in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded. All the facts and circumstances are, however, to be considered in order to determine the fundamental question — whether the necessary effect of the combination is to restrain interstate commerce."²

§ 402. **Parties Defendant.** — In a suit in equity by the government, under the fourth section of the statute, to restrain an alleged unlawful unincorporated association, it is sufficient that the association, its officers and a number of its members, be made parties defendant.³ This is in accordance with the rule that where parties are numerous some of them may be cited in as representing the whole number.

Where, however, an action is brought, under the statute, against the directors or trustees of such an association, who

proved. The question is one of law in regard to the meaning and effect of the agreement itself; namely, does the agreement restrain trade or commerce in any way so as to be a violation of the act? We have no doubt that it does."

¹ *United States v. Hopkins*, 82 Fed. 534 (1897), (*reversed* 171 U. S. 578 (1898), (19 Sup. Ct. Rep. 40)): "The first question, whether there is any combination in restraint of trade or commerce, or a combination to monopolize any part of trade or commerce, on the part of the defendant association, is to be determined, not alone from what appears upon the face of its preamble, rules and by-laws, but from the entire situation and the practical working and results of the defendants'

methods of doing business, as disclosed by the testimony in the case."

In *United States v. Workingmen's Amalgamated Council*, 54 Fed. 994 (1893), it was held that in order to sustain the allegations of a bill praying an injunction against a combination in restraint of interstate commerce, the complainant might offer in evidence the official proclamation of the various government officers, and also newspaper reports, supported by affidavits, containing manifestoes and declarations of the respondents.

² *Addyston Pipe, etc. Co. v. United States*, 175 U. S. 211 (1899), (20 Sup. Ct. Rep. 96).

³ *United States v. Coal Dealers Ass'n*, 85 Fed. 260 (1898).

manage and control its affairs, all the directors or trustees are necessary parties.¹

§ 403. **Effect of Voluntary Dissolution of Combination pending Proceedings.** — The equitable remedy afforded the government to restrain combinations in violation of the statute is for the protection of the rights of the public, and the relief granted should be adequate to the occasion. The mere dissolution of the unlawful combination may not be the most important part of the litigation. The essential question is the *validity* of the agreement, and the injunction prayed for may properly go so far as to enjoin the execution of similar agreements in the future.

In such a case, the dissolution of an unlawful association, after judgment and pending appeal, does not deprive the appellate court of jurisdiction.²

§ 404. **Limitations of Actions.** — The right of action for the recovery of treble damages, under the seventh section of the statute, is granted as a remedy for a private wrong, and is compensatory in its purpose and effect — the damages allowed in excess of those actually sustained being regarded as exemplary damages.³ An action based upon the statute,

¹ Greer v. Stoller, 77 Fed. 1 (1896).

² United States v. Trans-Missouri Freight Ass'n, 166 U. S. 309 (1896), (17 Sup. Ct. Rep. 540): "Although the general rule is that equity does not interfere simply to restrain a possible future violation of law, yet where parties have entered into an illegal agreement and are acting under it, and there is no adequate remedy at law and the jurisdiction of the court has attached by the filing of a bill to restrain such or any like action under a similar agreement, and a trial has been had, and judgment entered, the appellate jurisdiction of the court is not ousted by a simple dissolution of the association effected subsequently to the entry of judgment in the suit. Private parties may settle their controversies at any time, and rights which a plaintiff may have had at the time of the commencement of the action may terminate be-

fore judgment is obtained or while the case is on appeal, and, in any such case, the court, being informed of the facts, will proceed no further in the action. Here, however, there has been no extinguishment of the rights (whatever they are) of the public, the enforcement of which the government has endeavored to procure by a judgment of a court under the provisions of the act of Congress above cited. The defendants cannot foreclose those rights nor prevent the assertion thereof by the government, as a substantial trustee for the public under the act of Congress, by any such action as has been taken in this case."

See also United States v. Workmen's Amalgamated Council, 54 Fed. 994 (1893).

³ City of Atlanta v. Chattanooga Foundry, etc. Co., 101 Fed. 900 (1900).

therefore, being remedial, rather than penal, in its nature is governed, as to limitation, by the statute of the State where it is brought, and not by the federal statute prescribing a limitation of five years for a "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States."¹

II.

STATE ANTI-TRUST STATUTES.

CHAPTER XLI.

STATE STATUTES AND THEIR CONSTITUTIONALITY.

- § 405. The Statutes. Scope of State Legislation.
- § 406. Power of State to prohibit Combinations of *Quasi-public* Corporations.
Power over Property devoted to Public Uses.
- § 407. Power of State to prohibit Combinations of Corporations in Exercise of Reserved Power.
- § 408. Validity of State Statutes tested by Fourteenth Amendment — (A) Right to contract.
- § 409. Validity of State Statutes tested by Fourteenth Amendment — (B) Police Power of the State.
- § 410. Validity of State Statutes tested by Fourteenth Amendment — (C) Class Legislation.

§ 405. The Statutes. Scope of State Legislation. — A summary of all the State laws against combinations — commonly called "anti-trust" acts — is printed in the subjoined note.²

¹ Rev. Stat. U. S. § 1047.

² *Alabama*. Code 1896, ch. 196, art. V., § 5557: "Any person or corporation, who engages or agrees with other persons or corporations, or enters into, directly or indirectly, any combination, pool, trust or confederation, to regulate or fix the price of any article or commodity to be sold within this State for speculation; or any person or corporation who enters into, becomes a member of, or party to, any pool, agreement, combination, or confederation to fix or limit the quan-

tity of any article or commodity to be produced, manufactured, mined, or sold in this State, must, on conviction, be fined not less than five hundred, nor more than two thousand dollars."

Ib. § 5558: "Any corporation chartered under the laws of this State, or any officer, stockholder, agent, or employee of any such corporation, which enters into any combination with any other corporation or person with the intent to place the management or control of any such corporation in the hands of

These statutes are the manifestation of the intense feeling of the people, in many sections of the country, against "trusts."

another corporation or person, and thereby limit or fix the price, or restrict or diminish the production, manufacture, sale, use, or consumption of any article of commerce, must, on conviction, be fined not less than five hundred nor more than two thousand dollars."

Arkansas. Const. Art. II. § 19: "Perpetuities and monopolies are contrary to the genius of a republic, and shall not be allowed. . . ."

Act of March 6, 1899: "Any corporation organized under the laws of this or any other State, or country, and transacting or conducting any kind of business in this State, or any partnership or individual, or other associations or persons whatsoever, who shall create, enter into, become a member of, or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual or any other person or association of persons, to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, or to maintain said price when so regulated or fixed, or shall enter into, become a member of or a party to any pool, agreement, contract, combination, association or confederation to fix or limit the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any kind of policy issued by any corporation, partnership, individual or association of persons aforesaid, shall be deemed and adjudged guilty of a conspiracy to defraud and be subject

to the penalties as provided by this act."

For penalties against corporations and individuals see *post*, §§ 419 *n*, 420 *n*.

California. Code 1899, p. 705 (Act of Feb. 27, 1893), relates only to combinations to obstruct the sale of *live stock* in the State. Pom. Civ. Code, 1901, §§ 1673, 1674 and 1675 relate to conventional contracts in restraint of trade.

Florida. Laws 1897, ch. 4534, relates only to combinations to obstruct the sale of meat or edible live stock in the State. For penalties against corporations and individuals see *post* §§ 419 *n*, 420 *n*.

Georgia. Supp. Code 1901, § 6467: "From and after the passage of this Act, all arrangements, contracts, agreements, trusts or combinations between persons or corporations made with a view to lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported into this State, or in the manufacture or sale of articles of domestic growth or of domestic raw material, and all arrangements, contracts, agreements, trusts or combinations between persons or corporations designed, or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such product or article, are hereby declared to be against public policy, unlawful and void."

For Georgia constitutional provision, Art. IV. § 2, par. 4, against agreements for prevention of competition, see *ante*, § 32 *n*. For exemption of agricultural products and live stock see *post*, § 410 *n*. For penalties against corporations and individuals see *post*, §§ 419 *n*, 420 *n*.

Illinois. Meyer's Ill. Stat. 1898, ch. 140 *b* (Act of July 11, 1891, as amended by Laws 1897, p. 298): (1) "If any corporation organized under the laws of this or any other State or country, for transacting or conducting any kind of business in this State, or any part-

From whatever point the combination may be viewed, therefore, it is to be regretted that legislatures, in enacting

nership or individual or other association of persons whatsoever, shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual, or any other person or association of persons, to regulate or fix the price of any article of merchandise or commodity, or shall enter into, become a member of or a party to any pool, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this State, such corporation, partnership or individual or other association of persons shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to indictment and punishment as provided in this Act. . . .

(2) "It shall not be lawful for any corporation to issue or to own trust certificates, or for any corporation, agent, officer or employees, or the directors or stockholders of any corporation, to enter into any combination, contract or agreement with any person or persons, corporation or corporations, or with any stockholder or director thereof, the purpose and effect of which combination, contract or agreement shall be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees, with the intent to limit or fix the price or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict or diminish the manufacture or output of any such article."

(3) All contracts or agreements in violation of any provision of this act are absolutely void.

For exemption of combinations to maintain wages see *post*, § 410 *n*.

For provision that act may be pleaded as a defence see *post*, § 418 *n*.

For penalties against corporations and individuals see *post*, §§ 419 *n*., 421 *n*.

The later Illinois anti-trust act of June 20, 1893 (Starr and Curtis Ann. Stat. ch. 38, par. 109), has been declared unconstitutional by the Supreme Court of the United States. See *post*, § 410.

For exemption of agricultural products and live stock from this act see *post*, § 410 *n*.

Indiana. Horner's Anno. Stat. 1901, § 7554 (Act of March 5, 1897): "From and after the passage of this act, all arrangements, contracts, agreements, trusts, or combinations between persons or corporations who control the output of said article of merchandise, made with a view to lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported into this State, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations who control the output of said article of merchandise designed, or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such product or article, are hereby declared to be against public policy, unlawful and void.

Ib. § 7556: "That any violations of the provisions of this act shall be deemed and is hereby declared to be destructive of full and free competition and a conspiracy against trade. . . ."

Ib. § 7557: "The persons designed by this act to be affected hereby are those who own, control or manufacture the output of any particular article of merchandise mentioned therein. . . . For exemption of agricultural products and live stock see *post*, § 410 *n*.

Ib. § 7559 *a* (Act of March 3, 1899): "That any person, firm or association of persons who shall make any contract or enter into any agreement or make any combination or enter into any arrangement, directly or indirectly, to

these laws, have had so little regard for the fundamental principles upon which the right of the State to act depends.

induce, procure or prevent any whole-sale or retail dealers in or manufacturer of merchandise or of supplies or of material or article intended for trade or use by any mechanic, artisan or dealer in the prosecution of his business from selling such supplies to any dealer or to any mechanic or artisan; and that any dealer in or manufacturer of such supplies or material or article of trade or supplies or material to be used by any mechanic, artisan or dealer who shall be a party, directly or indirectly, to any such contract, combination or arrangement, or who shall, upon the request of any party to any such contract, combination or arrangement, refuse to sell such articles of trade, supplies or materials or articles sold by any dealer or used by any mechanic or artisan, to any such person or persons who may require them in the prosecution of their said business, for the reason that said dealer, mechanic or artisan is not a member of a combination or association of persons, shall be guilty of a conspiracy against trade. And all such contracts, agreements, combinations or arrangements shall be void and of no effect whatever in law."

Ib. § 7559 *f* (Act of March 8, 1901): "That from and after the passage of this act, all arrangements, agreements, trusts or combinations, or any agreements or arrangements that are made whereby a party or corporation refuses to furnish any article or articles required to be used in the manufacture of any article of merchandise when the party or corporation can furnish the same or by charging more than the regular and ordinary price for the same or doing or refusing to do any act or acts that would cause such party to cease to manufacture such article or hinder such person or corporation from so doing, and that all arrangements, contracts, or acts done or performed between any person or corporation engaged in the business of manufacturing any article,

or compelling the same to close down or go out of business, is hereby declared to be against public policy, unlawful and void."

For penalties against corporations and individuals see *post*, §§ 419 *n.*, 420 *n.*

Iowa. McClain's Anno. Code (Supp. to 1892), § 5453 *a*: "If any corporation organized under the laws of this or any other State or country, for transacting or conducting any kind of business in this State, or any partnership, or individual, or other association of persons whosoever, who shall create, enter into, or become a member of, or a party to, any trust, agreement, combination, confederation, or understanding with any other corporation, partnership, individual, or any person or association of persons, to regulate or fix the price of any article of merchandise or commodity, or who shall enter into, become a member of or party to any pool, agreement, contract, combination, or confederation to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this State, shall be deemed and adjudged guilty of a conspiracy to defraud." The Iowa statute also contains substantially the same provisions as the Illinois statute (*supra*) against the issue or ownership of trust certificates and against agreements for the purpose of placing the control of corporations in the hands of a trustee. For provision that act may be pleaded as a defence see *post*, § 418 *n.* For penalties against corporations and individuals see *post*, §§ 419 *n.*, 420 *n.*

Kansas. Rev. Stat. 1899, ch. 113 *a* (Act of 1897): "A trust is a combination of capital, skill or acts, by two or more persons, firms, corporations, or associations of persons, or either two or more of them, for either, any or all of the following purposes:

"*First.* To create or carry out re-

The public have the right to have the *status* of the combination, in its relation to the State, determined. Unconstitutional laws are worse than no laws.

restrictions in trade or commerce or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this State.

"*Second.* To increase or reduce the price of merchandise, produce or commodities, or to control the cost of rates of insurance.

"*Third.* To prevent competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or to prevent competition in aids to commerce.

"*Fourth.* To fix any standard or figure, whereby its price to the public shall be, in any manner, controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this State.

"*Fifth.* To make or enter into, or to execute or carry out, any contract, obligation or agreement of any kind or description by which they shall bind or have to bind themselves not to sell, manufacture, dispose of or transport any article or commodity, or articles of trade, use, merchandise, commerce or consumption below a common standard figure or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graded figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in transportation, sale or manufacture of any such article or commodity, or by which they shall agree to pool, combine or unite any interest they may have in connection with the manufacture, sale or transportation of any such article or commodity, that its price may in any manner be affected. And any such combinations

are hereby declared to be against public policy, unlawful and void."

For provision that act may be pleaded as defence see *post*, § 418.

For penalties against corporations and individuals see *post*, §§ 419 *n.*, 420 *n.*

Gen. Stat. 1899, § 2390: "Every person, servant, agent or employee of any firm or corporation doing business within the State of Kansas that shall conspire or combine with any other persons, firm or corporation, within or without the State, for the purpose of monopolizing any line of business, or shall conspire or combine for the purpose of preventing the producer of grain, seeds or live-stock or hay, or the local buyer thereof, from shipping or marketing the same without the agency of any third person, firm or corporation, shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined in a sum not less than one thousand dollars and not to exceed five thousand dollars, for each offence."

Kansas has also another anti-trust statute (Gen. Stat. (1899) § 2377) similar in its provisions to the North Dakota act *infra* and the Indiana act *supra*, and containing (§ 2378) substantially the same provision as to trust certificates and the placing of control in the hands of trustees as the Illinois statute *supra*.

Kentucky. Const. § 198: "It shall be the duty of the General Assembly, from time to time, as necessity may require, to enact such laws as may be necessary to prevent all trusts, pools, combinations or other organizations, from combining to depreciate below its real value any article, or to enhance the cost of any article above its real value."

Carroll's Stat. (1899), ch. 101, § 3915 (Act of 1890): "If any corporation under the laws of Kentucky, or under the laws of any other State or

There are clear and adequate anti-trust laws upon the statute books, but a very large proportion of the acts furnish

country, for transacting or conducting any kind of business in this State, or any partnership, company, firm or individual, or other association of persons, shall create, establish, organize or enter into, or become a member of, or a party to, or in any way interested in, any pool, trust, combine, agreement, confederation or understanding with any other corporation, partnership, individual or person, or association of persons, for the purpose of regulating or controlling or fixing the price of any merchandise, manufactured articles or property of any kind, or shall enter into, become a member of, or party to, or in any way interested in, a pool, agreement, contract, understanding, combination or confederation, having for its object the fixing, or in any way limiting, the amount or quantity of any article of property, commodity or merchandise to be produced or manufactured, mined, bought or sold, shall be deemed guilty of the crime of conspiracy." The act contains provisions similar to those of the Illinois statute, *supra*, concerning trust certificates and trustees, and the invalidity of contracts. For provision that act may be pleaded as a defence see *post*, § 418 n. For penalties against corporations and individuals see *post*, §§ 419 n., 420 n.

Louisiana. Const. Art. CXI: "It shall be unlawful for persons or corporations, or their legal representatives, to combine or conspire together, or to unite or pool their interests, for the purpose of forcing up or down the price of any agricultural product or article of necessity for speculative purposes; and the legislature shall pass laws to suppress it."

Rev. Laws (Wolff, 1897), p. 205: "After the passage of this act, it shall be unlawful for any individual, firm, company, corporation or association to enter into, continue or maintain any combination, agreement or arrangement of any kind, expressed or implied,

with any other individual, firm, company, association or corporation for any of the following purposes: *First*, to create or carry out restrictions in trade. *Second*, to limit or reduce the production, or increase or reduce the price, of merchandise, produce or commodities. *Third*, to prevent competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities. *Fourth*, to fix at any standard or figure, whereby its price shall be in any manner controlled or established, any article of merchandise, produce, commodity or commerce intended for consumption in this State. *Fifth*, to make or enter into or execute or carry out any contract, obligation or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce, or consumption below a common standard figure, or by which they shall agree in any manner to keep the price of such article at a fixed or graduated figure, or by which they shall, in any manner, establish or settle the price of any article or commodity or transportation between them, or themselves and others, to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected."

For exemption of agricultural products and live stock see *post*, § 410 n.

For penalties against corporations and individuals see *post*, §§ 419 n., 420 n.

Louisiana has also another statute directed against combinations in restraint of domestic trade and commerce which is, apparently, modelled after the

the most obvious examples of class legislation. Other statutes may be declared unconstitutional, because — entirely un-

federal anti-trust act (Rev. Laws, Wolff, 1897, p. 204; Act of 1890).

Maine. Laws 1889, ch. 266: (1) "It shall be unlawful for any firm or incorporated company, or any number of firms or incorporated companies, or any unincorporated company, or association of persons or stockholders, organized for the purpose of manufacturing, producing, refining or mining any article or product which enters into general use and consumption by the people, to form or organize any trust, or to enter into any combination of firms, incorporated or unincorporated companies, or association of stockholders, or to delegate to any one or more board or boards of trustees or directors the power to conduct and direct the business of the whole number of firms, corporations, companies or associations which may have, or which may propose to form, a trust, combination or association inconsistent with the provisions of this section and contrary to public policy."

(2) "No certificate of stock, or other evidence of interest, in any trust, combination or association, as named in sect. 1 of this act, shall have legal recognition in any court in this State, and any deed to real estate given by any person, firm or corporation, for the purpose of becoming interested in such trust, combination or association, or any mortgage given by the latter to the seller, as well as all certificates growing out of such transaction, shall be void."

(3) "Any incorporated company now operating under the laws of this State, and which, at the date of the passage of this act, may be interested in any trust, combination or association, named in sect. 1 of this act, or any firm, incorporated or unincorporated company or association of persons or stockholders, who shall enter into or become interested in such trust, combination or association, after the passage of this act, shall be deemed guilty

of a misdemeanor, and be subject to a fine of not less than five nor more than ten thousand dollars."

Maryland. Declaration of Rights, Art. XLI: "Monopolies are odious, contrary to the spirit of free government and the principles of commerce, and ought not to be suffered."

Michigan. The latest Michigan statute (Public Acts 1899, No. 255) defines a trust in substantially the same language as the Kansas statute, *supra*. It declares every trust, as so defined, unlawful, against public policy and void; that any violation of the act is "a conspiracy against trade," and that any person engaging in such conspiracy shall be punished by a fine or imprisonment, or both. Charters of domestic corporations violating the act are subject to forfeiture, and foreign corporations may be excluded from the State. The act also contains provisions similar to those in the Illinois statute (*supra*) concerning trust certificates, trustees and the invalidity of contracts in violation of the act. For further statement of penalties see *post*, §§ 419 n., 420 n.

Michigan has also an earlier anti-trust statute (Compiled Laws 1897, §§ 11,377-11,382), which contains an exemption of agricultural products and live stock. See *post*, § 410 n.

Minnesota. Laws 1899, ch. 359: (1) "Any contract, agreement, arrangement or conspiracy, or any combination in the form of a trust, or otherwise, hereafter entered into which is in restraint of trade or commerce within this State, or in restraint of trade or commerce between any of the people of this State and any of the people of any other State or country, or which limits or tends to limit or control the supply of any article, commodity or utility, or the articles which enter into the manufacture of any article of utility, or which regulates, limits or controls, or raises or tends to regulate, limit, control or raise the market price of any article, commodity

necessarily — the legislatures have employed such sweeping terms as to take away the right to contract. Instead of

or utility, or tends to limit or regulate the production of any such article, commodity or utility, or in any manner destroys, limits or interferes with open and free competition in either the production of any commodity, article or utility, is hereby prohibited and declared to be unlawful."

(2) "That when any corporation heretofore or hereafter created, organized or existing under the laws of this State, whether general or special, hereafter unites in any manner with any other corporation wheresoever created, or with any individual, whereby such corporation surrenders or transfers, by sale or otherwise, in whole or in part, its franchise, rights or privileges or the control or management of its business to any other corporations or individual, or whereby the business or the management or control of the business of such corporation is limited, changed or in any manner affected, and the purpose or effect of such union or combination is to limit, control or destroy competition in the manufacture or sale of any article or commodity, or is to limit or control the production of any article or commodity, or is to control or fix the price or market value of any article or commodity, or the price or market value of the material entering into the production of any article or commodity, or in case the purpose or effect of such union or combination is to control or monopolize in any manner the trade or commerce, or any part thereof, of this State, or of the several States, such union, combination, agreement, arrangement or contract is hereby prohibited and declared to be unlawful."

The act also contains the following provision: "Any person who shall enter into any correspondence, negotiations or agreement in this State, or who shall, being a resident of this State, go into another State, Territory or country for the purpose of entering into any negotiations or agreement

which tend to the formation of any contract or combination forbidden by this act, shall be guilty of felony, and be subject to all the penalties of this act."

For penalties against corporations and individuals see *post*, §§ 419 *n.*, 420 *n.*

Laws 1901, ch. 24: "Every pool, trust, agreement, combination, confederation, or understanding, conspiracy and combination entered into or created or organized under the laws of this or any other State, or any partnership or individual or other association of persons whatsoever with any other corporation, partnership, individual or any other person or association of persons to regulate, control or fix the price of any article or articles of manufacture, mechanism, merchandise, commodity, convenience or repair, or any product of mining of any kind or class, or any article or thing of any class or kind bought and sold, or to maintain said price or prices when so regulated, determined or fixed, and all agreements, combinations, confederations or conspiracies or pools, made, created, entered into or organized by any corporation, partnership, individual or association of individuals to fix the amount or limit the quantity of any article or thing whatsoever . . . are hereby declared illegal. If any two or more persons or corporations who are engaged in buying or selling any article . . . shall enter into any pool, trust, agreement, combination, confederation, association or understanding to control or limit the trade in any such article or thing; or to limit competition in such trade by refusing to buy from or sell to any other person or corporation any such article or thing aforesaid for the reason that such other person or corporation is not a member of or a party to such pool, trust, combination, confederation, association or understanding; or shall boycott or threaten any person or corporation from buying from or selling to any other person or cor-

providing definite remedies for definite evils, some of the statutes merely furnish an assortment of words.

poration who is not a member of or a party to such pool, trust, agreement, combination, confederation, association or understanding, any such article or thing aforesaid, it shall be a violation of this act."

Persons injured may maintain civil actions for damages.

Former anti-trust acts are not repealed by this statute.

Mississippi. Const. § 198: "The legislature shall enact laws to prevent all trusts, combinations, contracts and agreements inimical to the public welfare."

Code, § 4437: "A trust and combine is a combination, contract, understanding or agreement, expressed or implied, between two or more persons, corporations, or firms or associations of persons, or between one or more of either with one or more of the others; (a) In restraint of trade; (b) to limit, increase or reduce the price of a commodity; (c) to limit, increase or reduce the production or output of a commodity; (d) intended to hinder competition in the production, importation, manufacture, transportation, sale or purchase of a commodity; (e) to engross or forestall a commodity; (f) to issue, own or hold the certificates of stock of any trust or combine; (g) to place the control, to any extent, of business or of the products or earnings thereof, in the power of trustees, by whatever name called; (h) by which any other person than themselves, their proper officers, agents and employees shall, or shall have the power to, dictate or control the management of business; or (i) to unite or pool interests in the importation, manufacture, production, transportation or price of a commodity; and is inimical to the public welfare, unlawful, and a criminal conspiracy." . . .

The Code further provides that all contracts relative to the business of the combination shall be void.

For exemption of associations of

laborers and those engaged in husbandry see *post*, § 410 n.

For penalties against corporations and individuals see *post*, §§ 419 n., 420 n.

Laws 1900, ch. 88: Section 1 contains same provisions as section 4437 of the Code, omitting the provision excepting "associations of those engaged in husbandry," etc.

Sec. 2. "Any corporations, domestic or foreign, which shall restrain or attempt to restrain the freedom of trade or production; or which shall monopolize or attempt to monopolize the production, control or sale of any commodity, or the prosecution, management or control of any kind, class or description of business; or which shall engross or forestall or attempt to engross or forestall any commodity; or which shall destroy competition in the manufacture or sale of a commodity, by offering the same for sale at a price below the normal cost of production, shall be deemed a trust and combine within the meaning and purpose of this Act, shall be liable to all the pains, penalties, fines, forfeitures, judgments and recoveries herein denounced against trusts or combines, and shall be proceeded against in manner and form provided in this Act in case of other trusts and combines."

Sec. 3. Contracts to enter into or form trust, etc., and contracts by another with any trust, etc., or members of trust relative to business of trust, etc., are void.

Sec. 4. Domestic corporations violating act forfeit charters and franchises, and foreign corporations forfeit right to do business in the State. Individuals punished by fines or imprisonment, or both.

Sec. 5. No corporations shall purchase stock or franchises, plants, etc., of any competing corporations.

Sec. 6. Corporations not to engage in business unauthorized by charters.

All the evils of the combination cannot be remedied by legislation. For some, the working of economic principles

Sec. 7. Persons damaged by trust, etc., may recover five hundred dollars and all actual damage.

Another section provides that the act shall be construed liberally to the end that trusts, etc., may be suppressed.

Missouri. Rev. Stat. 1899, § 8965: "Any corporation organized under the laws of this or any other State or country for transacting or conducting any kind of business in this State, or which does transact or conduct any kind of business in this State, or any partnership or individual or other association of persons whatsoever, who shall create, enter into, become a member of, or a party to, any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual or any other person or association of persons, to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, or to maintain said price when so regulated or fixed, or shall enter into, become a member of, or a party to, any pool, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to penalties as provided in this article; and provided, that if such insurance companies or their agents or the board of fire underwriters doing business in any city of this State shall combine in any city of this State, either directly or indirectly, or agree or attempt to agree,

directly or indirectly, to fix or regulate the price or premium to be paid for insuring property located within or outside of such city against loss or damage by fire, lightning or storm, such company so violating the provisions of this article, either by itself, its agents, or by any such board of underwriters, shall be taken and deemed to have forfeited its right to do business in this state, and shall become liable to all the penalties and forfeitures provided for by the provisions of this article."

Ib. § 8966: "All arrangements, contracts, agreements or combinations between persons or corporations, or between persons or any association of persons and corporations, designed or made with a view to lessen, or which tend to lessen, full and free competition in the importation, manufacture or sale of any article, product or commodity in this state, and all arrangements, combinations, contracts or agreements whereby, or under the terms of which, it is proposed, stipulated, provided, agreed or understood that any persons, association of persons or corporations doing business in this State shall deal in, sell or offer for sale in this State, any particular or specified article, product, or commodity, and shall not, during the continuance or existence of any such arrangement, combination, contract or agreement, deal in, sell or offer for sale in this State, any competing article, product or commodity, are hereby declared to be against public policy, unlawful and void; and any person, association of persons or corporation becoming a party to any such arrangement, contract, agreement or combination shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to the penalties provided for in this article." The statute also contains provisions similar to those of the Illinois statute *supra* concerning trust certificates and trustees (§ 8967), invalidity of contracts in violation of act,

will afford relief. Others must be endured. But legislation can furnish remedies for many evils. The federal anti-trust

and right to plead the act as a defence (§ 8970).

For penalties against corporations and individuals see *post*, §§ 419 n., 420 n.

A later statute (§ 8978) also provides: "Every pool, trust, agreement, combination, confederation or understanding, conspiracy or combination entered into, or created, or organized by any corporations organized under the laws of this or any other State, or any partnership or individual or other association of persons whatsoever with any other corporation, partnership, individual or any other person or association of persons to regulate, control or fix the price of any article or articles of manufacture, mechanism, merchandise, commodity, convenience or repair, or any product of mining of any kind or class, or any article or thing of any class or kind bought and sold, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, or to maintain said price or prices when so regulated, determined or fixed, and all agreements, combinations, confederations or conspiracies or pools made, created, entered into or organized by any other corporation, partnership, individual or association of individuals to fix the amount or limit the quantity of any article or thing whatsoever, or of any article of manufacture, mechanism, commodity, convenience or repair, or any product of any class or kind of mining, are hereby declared illegal. If any two or more persons or corporations who are engaged in buying or selling any article of commerce, manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, shall enter into any pool, trust, agreement, combination, confederation, association or understanding to control or limit the trade in any such article or thing, or to limit competition in such trade, by refusing to buy from or sell to any other person

or corporation any such article or thing aforesaid, for the reason that such other person or corporation is not a member of or party to such pool, trust, combination, confederation, association or understanding; or shall boycott or threaten any person or corporation for buying from or selling to any other person or corporation who is not a member of or a party to such pool, trust, agreement, combination, confederation, association or understanding any such article or thing aforesaid, it shall be a violation of this article." This statute permits any person injured in his business or property by any unlawful combination to recover threefold damages (§ 8981).

Montana. Const. Codes and Statutes (Sander's), 1895, § 321: "Every person, corporation, stock company or association of persons in this State who shall, directly or indirectly, combine or form what is known as a trust, or make any contract with any person or persons, corporations or stock companies, foreign or domestic, through their stockholders, directors, officers, or in any manner whatever, for the purpose of fixing the price or regulating the production of any article of commerce, or of the product of the soil for consumption by the people, or to create or carry out any restriction in trade, to limit productions, or increase or reduce the price of merchandise or commodities, or to prevent competition in merchandise or commodities, or to fix a standard or figure whereby the price of any article of merchandise, commerce or produce, intended for sale, use or consumption, will be in any way controlled, or to create a monopoly in the manufacture, sale or transportation of any such article, or to enter into an obligation by which they shall bind others or themselves not to manufacture, sell or transport any such article below a common standard or figure, or by which they agree to keep such article or transpor-

law is an effective instrument for the prevention of combinations in restraint of interstate commerce. State legislation

tation at a fixed or graduated figure, or by which they settle the price of such article, so as to preclude unrestricted competition, is punishable by imprisonment in the State prison not exceeding five years, or by fine not exceeding ten thousand dollars, or both."

For exemption of combinations of laborers and of those engaged in agriculture and horticulture see *post*, § 410 n. For penalties against corporations see *post*, § 420 n.

Nebraska. The latest statute (Comp. Stat. 1901, ch. 91 a, § 5337) defines a trust in substantially the same language as the Kansas statute, *supra*, and provides: "That any and all acts by any person or persons carrying on, creating, or attempting to create, either directly or indirectly, a trust as defined in section one of this act, are hereby declared to be a conspiracy against trade and business and unlawful, and any person who may be or may become engaged in any such conspiracy, or take part therein, or aid or advise in its commission, or who shall as principal, manager, director, agent, servant or employee, or in any other capacity, knowingly aid or advise or attempt to carry out, or carry out any of the stipulations, purposes, prices, rates, orders thereunder, or in pursuance thereof, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than twenty-five dollars nor more than five thousand dollars." This statute contains a special provision concerning combinations of fire insurance companies.

For exemptions of associations of laboring men see *post*, § 410 n. For provision that act may be pleaded as a defence see *post*, § 418 n. For penalties against corporations, and provisions for the recovery of damages see *post*, § 420 n.

New Mexico. Comp. Laws (1897), § 1292: "Every contract or combination between individuals, associations or corporations, having for its object, or

which shall operate, to restrict trade or commerce or control the quantity, price or exchange of any article of manufacture or product of the soil or mine, is hereby declared to be illegal. Every person, whether as individual or agent or officer or stockholder of any corporation or association, who shall make any such contract or engage in any such combination, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding one thousand dollars nor less than one hundred dollars, and by imprisonment at hard labor not exceeding one year, or until such fine has been paid."

Ib. § 1293: "Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce of this territory, shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by" fine and imprisonment.

The act further provides that all contracts in violation of its provisions shall be void and that purchasers of commodities from persons or corporations violating the act shall not be liable therefor.

New York. Birdseye's R. S. 1901, p. 2405 (Laws 1899, ch. 690), "§ 1: Every contract, agreement, arrangement or combination, whereby a monopoly in the manufacture, production or sale in this State of any article or commodity of common use is or may be created, established or maintained, or whereby competition in this State in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby, for the purpose of creating, establishing or maintaining a monopoly within this State of the manufacture, production or sale of any such article or commodity, the free pursuit in this State of any lawful business, trade or occupation, is or may be restricted or prevented, is hereby declared to be against public policy, illegal and void.

may reach similar combinations affecting domestic trade and commerce.

"§ 2: Every person or corporation, or any officer or agent thereof, who shall make or attempt to make or enter into any such contract, agreement, arrangement or combination, or who, within this State, shall do any act pursuant thereto, or in, toward or for the consummation thereof, wherever the same may have been made, is guilty of a misdemeanor, and on conviction thereof shall, if a natural person, be punished by a fine not exceeding five thousand dollars, or by imprisonment for not longer than one year, or by both such fine and imprisonment; and if a corporation, by a fine of not exceeding five thousand dollars.

"§ 3: The attorney-general may bring an action in the name and in behalf of the people of the State against any person, trustee, director, manager, or other officer or agent of a corporation, or against a corporation, foreign or domestic, to restrain and prevent the doing in this State of any act herein declared to be illegal, or any act, in, toward or for the making or consummation of any contract, agreement, arrangement or combination herein prohibited wherever the same may have been made."

The remaining sections of the act relate to procedure in obtaining testimony.

Another New York statute (Laws 1897, ch. 384; Stock Corp. Law, § 7) is as follows: "No domestic stock corporation and no foreign corporation doing business in this State shall combine with any other corporation or person for the creation of a monopoly or the unlawful restraint of trade or for the prevention of competition in any necessary of life."

North Carolina. Const. Art. I. § 31: "Perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed."

Laws 1899, ch. 666: "Any corporation organized under the laws of this

or any other State or country for transacting or conducting any kind of business in this State, or any partnership or individual or other association of persons whatsoever, who shall create, enter into, become a member of, or a party to, any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual or any other person or association of persons to regulate or fix the price of any article of merchandise or commodity, or shall enter into, become a member of, or a party to, any pool, agreement, contract, combination or confederation to fix the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this State, shall be deemed and adjudged guilty of a conspiracy to defraud and be subject to the penalties provided in this act."

For exemptions under this statute see *post*, § 410 n. For penalties against corporations and individuals see *post*, §§ 419 n., 420 n.

North Dakota. Const. Art. VII. § 146: "Any combination between individuals, corporations, associations, or either, having for its object or effect the controlling of the price of any product of the soil or any article of manufacture or commerce, or the cost of exchange or transportation, is prohibited and hereby declared unlawful and against public policy, and any and all franchises heretofore granted or extended, or that may hereafter be granted or extended in this State, whenever the owner or owners thereof violate this article shall be deemed annulled and become void."

Rev. Code 1899, § 7484 a: "All arrangements, contracts, agreements, trusts or combinations between persons or corporations made with a view to lessen, or tend to lessen, full and free competition in the importation or sale of articles imported into this State, or in the manufacture or sale of articles

The early theory that when the constitution was silent the courts could annul legislation which they considered con-

of domestic growth, or of domestic raw material, and all arrangements, contracts, agreements, trusts or combinations between persons or corporations designed, or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such product or articles, are hereby declared to be against public policy, unlawful and void."

For penalties against corporations and individuals see *post*, §§ 419 *n.*, 420 *n.*

Rev. Code (§§ 7480-7484) also contains other provisions against combinations.

Ohio. Bates' Anno. Stat. (1787-1902), § 4427: This act defines a trust in substantially the same language as the Kansas statute *supra*, and declares every trust, as so defined, "unlawful, against public policy and void." Contracts in violation of the act are void, and persons injured may recover two-fold damages.

The act also contains a provision similar to that in the Illinois statute, *supra*, regarding trust certificates and the placing of control in the hands of trustees.

For penalties against corporations and individuals see *post*, §§ 419 *n.*, 420 *n.*

Ib. § 2485: An exclusive monopoly shall not be allowed to a gas company.

Oklahoma. Rev. Stat. 1893, ch. 83: (1) "If any individual, firm, partnership, or any association of persons whatsoever, shall create, enter into, become a member of, or a party to, any pool, trust, agreement, combination or understanding with any other individual, firm, partnership or association of persons whatsoever, to regulate or fix the price of, or prevent or restrict the competition in the sale of, provisions, feed, fuel, lumber or other building materials, articles of merchandise or other commodity, [they] shall be deemed guilty of [a] misdemeanor, and

upon conviction thereof shall be fined not less than fifty nor more than five hundred dollars."

(2) "It shall not be lawful for any corporation organized under the laws of this Territory, or organized under the laws of any other Territory or State, and doing business in this Territory, to enter into any combination, contract, trust, pool or agreement with any other corporation or corporations, or with any individual, firm, partnership or association of persons whatsoever, for the purpose of regulating or fixing the price of, or preventing or restricting competition in the sale of provisions, feed, fuel, lumber or other building materials, articles of merchandise or other commodity, including the fixing of the rate of interest."

For provision that act may be pleaded as a defence see *post*, § 418 *n.* For penalties against corporations see *post*, §§ 419 *n.*, 420 *n.*

South Carolina. Act of May 25, 1897, as amended by Act of Feb. 19, 1898: "All arrangements, contracts, agreements, trusts or combinations between two or more persons as individuals, firms or corporations, made with a view to lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported into this State, or in the manufacture or sale of articles of domestic growth, or of domestic raw material, and all arrangements, contracts, agreements, trusts or combinations between persons or corporations, designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such product or article, and all arrangements, contracts, trusts, syndicates, associations or combinations between two or more persons as individuals, firms, corporations, syndicates or associations, that may lessen or affect in any manner the full and free competition in any tariffs, rates, tolls, premiums or prices, or seeks to con-

trary to "the eternal laws of justice and right" is seldom advanced at the present day; but, as an equivalent for it, an

trol in any way or manner such tariffs, rates, tolls, premiums or prices in any branch of trade, business or commerce, are hereby declared to be against public policy, unlawful and void."

For penalties against corporations and individuals see *post*, §§ 419 n., 420 n.

South Dakota. Const. Art. XVII. par. 20: "Monopolies and trusts shall never be allowed in this State, and no incorporated company, copartnership or association of persons in this State shall, directly or indirectly, combine or make any contract with any incorporated company, foreign or domestic, through their stockholders or the trustees or assigns of such stockholders, or with any copartnership or association of persons, or in any manner whatsoever to fix the prices, limit the production or regulate the transportation of any product or commodity so as to prevent competition in such prices, production or transportation, or to establish excessive prices therefor. The legislature shall pass laws for the enforcement of this section by adequate penalties, and, in the case of incorporated companies, if necessary for that purpose, may, as a penalty, declare the forfeiture of their franchises."

Stat. 1901, § 3388: "Within the meaning of this act, a trust or a monopoly is a combination of capital, skill, or acts of two or more persons, firms, corporations or associations of persons, first, to create or carry out restrictions in trade; second, to limit the production or to increase or reduce the price of commodities; third, to prevent competition in the manufacture, transportation, sale or purchase of merchandise, produce or commodities; fourth, to fix any standard or figure whereby the price to the public shall be in any manner established or controlled; provided, that nothing in this act shall be construed so as to include labor organizations."

Ib. § 3389: "That it shall be unlawful for any incorporated company, copartnership or association of persons in this State, directly or otherwise to fix prices, limit the production or regulate the transportation of any product or commodity so as to obstruct or delay or prevent competition in such production or transportation or limit transportation of commodities or to fix prices therefor."

Ib. § 3390: "That it shall be unlawful for any incorporated company, copartnership or association of persons in another State to directly or otherwise combine or make any contract with any incorporated company, copartnership, association of person or persons in this State to combine or make any contract to fix prices, limit the production of commodity or regulate the transportation, directly or otherwise, of any product or commodity so as to obstruct or prevent competition or limit transportation or to fix prices therefor."

For penalties against corporations and individuals see *post*, §§ 419 n., 420 n.

For earlier anti-trust laws of South Dakota, see Stat. (1899) §§ 3394-3398.

Tennessee. Const. Art. I. § 22: "That perpetuities and monopolies are contrary to the genius of a free State, and shall not be allowed."

Laws 1897, ch. 94: "All arrangements, contracts, agreements, trusts or combinations between persons or corporations made with a view to lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported into this State, or in the manufacture or sale of articles of domestic growth, or of domestic raw material, and all arrangements, contracts, agreements, trusts or combinations between persons or corporations designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such product or article, are hereby de-

inclination is sometimes manifested to set up the Fourteenth Amendment as a standard of "justice and right," and to

clared to be against public policy, unlawful and void."

Any person injured by any unlawful combination or trust may recover "the full consideration or sum paid by him or them for any goods, wares, merchandise, or articles, the sale of which is controlled by such combination of trust."

For exemption of agricultural products and live stock, see *post*, § 410 n.

For penalties against corporations and individuals see *post*, §§ 419 n., 420 n.

For earlier Tennessee anti-trust acts, see Code (1896), §§ 3185-3191 and 6622.

Texas. Const. Art. I. § 26: "Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed."

The Texas act of 1889 as amended by the Act of 1895 (Sayles' Stat. 1897, title CVIII.) contains a definition of a trust similar to that in the Kansas statute *supra*; provides for the forfeiture of the charters of domestic corporations and the exclusion from the State of foreign corporations violating its provisions, and declares that persons so offending shall be fined not less than fifty dollars nor more than five thousand dollars, or imprisoned not less than one year nor more than ten years, or both. Each day's violation constitutes a separate offence.

It is provided, however, that "this act shall not be held to apply to live stock and agricultural products in the hands of the producers or raisers, nor shall it be understood or construed to prevent the organization of laborers for the purpose of maintaining any standard of wages."

By reason of these exemptions the act has been held to be unconstitutional by the Texas Court of Civil Appeals (see *post*, § 410).

The later elaborate and most comprehensive anti-trust statute of 1899 (approved May 25, 1899), (Sayles' Stat. 1897, Supp. 1900, p. 214, has also

been declared unconstitutional for the same reason. For definition of word "monopoly" in this act see *ante*, § 332.

Utah. Const. Art. XII. § 20: "Any combination by individuals, corporations or associations, having for its object or effect the controlling of the price of any products of the soil, or of any article of manufacture or commerce, or the cost of exchange or transportation, is prohibited, and hereby declared unlawful, and against public policy. The legislature shall pass laws for the enforcement of this section by adequate penalties, and in case of incorporated companies, if necessary for that purpose, it may declare a forfeiture of their franchises."

Rev. Stat. 1898, § 1752: (1) "Any combination by persons having for its object or effect the controlling of the prices of any professional services, any products of the soil, any article of manufacture or commerce, or the cost of exchange or transportation, is prohibited and declared unlawful."

(2) "Any person or association of persons who shall create, enter into, become a member of, a party to any pool, trust, agreement, combination, confederation or understanding with any other person or persons to regulate or fix the price of any article of merchandise or commodity; or shall enter into, become a member of, or a party to, any pool, trust, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this State, shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to punishment as hereinafter provided."

The statute also contains provisions against trust certificates and trusts.

For penalties against corporations and individuals, see *post*, §§ 419 n., 420 n.

measure the constitutionality of State laws by the hardships they impose.

The grounds upon which federal courts may interfere with State statutes, and the scope of State legislation, cannot be more clearly stated than in two extracts from opinions of the Supreme Court of the United States: "It is hardly necessary to say that the hardship, impolicy or injustice of State laws is not necessarily an objection to their constitutional validity; and that the remedy for evils of that character is to be sought in the State legislatures."¹ [The fundamental principle must be recognized] "that outside of the field directly occupied by the General Government, under the powers granted to it by the Constitution, all questions arising within a State that relate to the internal order, or that involve the public convenience or the general good are, primarily, for the determination of the State, and that its legislative enactments relating to those subjects, and which are not incon-

Washington. Const. Art. XII. § 22: "Monopolies and trusts shall never be allowed in this State, and no incorporated company, copartnership or association of persons in this State shall, directly or indirectly, combine or make any contract with any other incorporated company, foreign or domestic, through their stockholders or the trustees or assignees of such stockholders, or with any copartnership or association of persons, or in any manner whatever, for the purpose of fixing the price or limiting the production or regulating the transportation of any product or commodity. The legislature shall pass laws for the enforcement of this section by adequate penalties, and, in case of incorporated companies, if necessary for that purpose, may declare a forfeiture of their franchise."

The Washington statute (Act of March 21, 1895) is confined to combinations of commission merchants.

Wisconsin. Stats. 1898, ch. 86, § 1791 j: "Corporations organized under the laws of this State are prohibited from entering into any combination, conspiracy, trust, pool, agreement or con-

tract intended to restrain or prevent competition in the supply or price of any article or commodity in general use in this State or constituting a subject of trade or commerce therein, or to control the price of any such article or commodity, to regulate or fix the price thereof, to limit or fix the amount or quantity thereof to be manufactured, mined, produced or sold in this State, or to fix any standard or figure by which its price to the public shall be in any manner controlled or established."

Other provisions of the statute relate to procedure.

For penalties under the act see *post*, § 420 n.

Wyoming. Const. Art. I. § 30: "Perpetuities and monopolies are contrary to the genius of a free State and shall not be allowed. Corporations being creatures of the State, endowed for the public good with a portion of its sovereign powers, must be subject to its control."

¹ *Missouri Pac. R. Co. v. Humes*, 115 U. S. 520 (1885), (6 Sup. Ct. Rep. 110).

sistent with the State constitution, are to be respected and enforced in the Courts of the Union, if they do not, by their operation, directly entrench upon the authority of the United States or violate some right protected by the National Constitution. The power here referred to is — to use the words of Chief Justice Shaw — the power ‘to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the Constitution, as they judge to be for the good and welfare of the Commonwealth and of the subjects of the same.’ ”¹

In determining the constitutionality of State anti-trust statutes the following propositions must be taken into consideration :

(1) *Quasi*-public corporations, in their relations with other corporations, are subject to the control of the State.

(2) Property devoted to public use is subject to public regulation.

(3) Under its reserved power, the State has greater power over a corporation than over an individual.

(4) The right to contract is a natural, but not an absolute, right.

(5) The police power of the State may be exercised for the promotion of the public welfare — not solely for the protection of the public health, morals and safety.

(6) The exemption of classes of persons and products from the operation of State anti-trust laws is in violation of the Fourteenth Amendment to the Constitution of the United States.

§ 406. **Power of State to prohibit Combinations of Quasi-public Corporations. Power over Property devoted to Public Uses.** — *Quasi*-public corporations, in consideration of the grant of public franchises, assume the performance of public duties. Contracts with other corporations interfering, in any degree, with the proper discharge of their obligations, are against public policy.

¹ Mr. Justice Harlan, in *Lake Shore, wealth v. Alger*, 7 Cush. (Mass.) 85 etc. *R. Co. v. Ohio*, 173 U. S. 285 (1899), (1851). (19 Sup. Ct. Rep. 465), citing Common-

The State may make regulations for the control and management of *quasi*-public corporations.¹ It may, by statute, provide penalties for the execution of agreements inimical to public policy, and may control the relations between such corporations. State laws, designed for the promotion of the public interests, prohibiting combinations of *quasi*-public corporations, are, unquestionably, constitutional.

But the power of the State is broader than its right to regulate *quasi*-public corporations. It is not dependent upon what may be termed the contractual obligations of those corporations — assumed in consideration of public grants, — but may grow out of the nature of the business of any corporation — *quasi*-public or private — or individual. Whenever the nature of a business implies a public duty, the State has power to see that the duty is performed. In the leading case of *Munn v. Illinois*,² the Supreme Court of the United States, in declaring constitutional a law regulating charges at grain elevators, said: "Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public have an interest, he, in effect, grants to the public an interest in that use and must submit to be controlled by the public for the common good to the extent of the interest he has thus

¹ See *Georgia, etc. Banking Co. v. Smith*, 128 U. S. 174 (1888), (9 Sup. Ct. Rep. 47), as an illustrative case.

² *Munn v. Illinois*, 94 U. S. 113 (1876). Mr. Chief Justice Waite, in his opinion, said (p. 125): "This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what is without its operative effect. Looking then to the common law from whence came the right which the constitution protects, we find that when private property is 'affected with a public interest it ceases to be *juris privati* only.' . . . Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at

large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control . . . (p. 130). But we need not go further. Enough has already been said to show that, when property is donated to a public use, it is subject to public regulation."

This doctrine was reaffirmed by the Supreme Court in *Budd v. New York*, 143 U. S. 517 (1892), (12 Sup. Ct. Rep. 468).

created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use, he must submit to the control."

This power of the State to exercise control over property devoted to a public use is analogous to its police power, but may be more precisely defined as its power, as trustee for the public, to enforce trusts attaching to property or business for the public benefit.

The question is entitled to serious consideration whether the exercise of this power may not afford an effective remedy for some of the evils of the combination. When a corporate combination obtains substantial control of the market for a necessary of life, its business—much more than that of a company operating a grain elevator—is "clothed with a public interest." Its property is "used in a manner to make it of public consequence and affect the community at large." Upon the principles of *Munn v. Illinois*, it would seem that the State might regulate the charges of such combinations—within reasonable limits—and exercise supervisory control over their management.¹

The corporate combination, when of controlling power, may well be subjected to the rules governing *quasi*-public corporations. Its efficiency lies in its corporate character. In consideration of the grant of powers, it should assume the

¹ The language of an old English case is singularly applicable. In *Aldnutt v. Inglis*, 12 East 527 (1810), it appeared that the London Dock Co. had acquired virtual control of the warehouses for the reception of wines from importers, and the question was whether it could charge arbitrary rates for storage or was obliged to accept reasonable compensation. Lord Ellenborough said (p. 547): "There is no doubt that the general principle is favored, both in law and justice, that every man may fix what prices he pleases upon his own property or the use of it; but if, for a particular purpose, the public have a right to resort to his premises and make use of them,

and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms. . . . (p. 539). It is enough that there exists in the place and for the commodity in question, a virtual monopoly of the warehousing for this purpose on which the principles of law attach as laid down by Lord Hale in the passage referred to [When private property is "affected with a public interest it ceases to be *juris privati* only." "*De Portibus Maris*" 1 Harg. Law Tracts, 78] which includes the good sense as well as the law of the subject."

same obligations to the public in their exercise, that the *quasi*-public corporation undertakes in consideration of the grant of franchises.

§ 407. **Power of State to prohibit Combinations of Corporations in Exercise of Reserved Power.** — Corporations are the creations of the State, endowed with such faculties as it bestows and subject to such conditions as it imposes. Where power is reserved to modify their charters, the reservation is a part of the contract between the corporation and the State, and a legitimate exercise of the power in no way impairs the obligation of the contract.¹

The power of the State, under its reservation, to regulate the contracts of corporations, and to control their relations with other corporations, is greater than its power over individuals. An act may be unconstitutional as to natural persons and constitutional as to corporations.²

It may be conceded that the legislature, under its right to amend, cannot take away from corporations the right to contract, or affect vested rights. But the State may, by laws having a prospective application, regulate the right to contract, and may prohibit combinations when prejudicial to the public interest. The determination of the question, what

¹ *St. Louis, etc. R. Co. v. Paul*, 173 U. S. 408 (1898), (19 Sup. Ct. Rep. 419).

In *Shaffer v. Union Mining Co.*, 55 Md. 74 (1880), the Supreme Court of Maryland said: "The acceptance by the corporation of a charter, with the reservation of the right to alter and amend, made that provision a part of the contract, which, as between the legislature and it as a private corporation, it must be understood to be. A corporation has no inherent or natural rights, like a citizen. It has no rights but those which are expressly conferred upon it, or are necessarily inferable from the powers actually granted, or such as may be indispensable to the exercise of such as may be granted. A private corporation is only a *quasi*-individual, the pure creation of the legislative will, with just such powers

as are conferred expressly or by necessary limitation, and no others."

Compare *Braceville Coal Co. v. People*, 147 Ill. 66 (1893), (35 N. E. Rep. 62).

² In *Leep v. St. Louis, etc. R. Co.* 58 Ark. 407 (1894), (25 S. W. Rep. 75), an act was held unconstitutional as affecting natural persons, but constitutional as to corporations, as an exercise of a reserved power "to alter, revoke and annul any charter of incorporation."

The Court conceded that the legislature, under its reserved power, could not take from corporations the right to contract, but held that it could regulate that right when demanded by the public interest, although not to such an extent as to render the corporation unable to fulfil the purposes of its organization.

combinations are prejudicial, is within the province of the legislature, and only in the case of gross perversion of power could the courts intervene.¹

§ 408. **Validity of State Statutes tested by Fourteenth Amendment — (A) Right to Contract.** — The test of the constitutionality of any State anti-trust statute may properly be the Fourteenth Amendment to the Constitution of the United States. It broadly guarantees the right of property. A statute against combinations which does not contravene its provisions does not conflict with any provision of any State constitution.

The Fourteenth Amendment provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The right of property secured by the Amendment necessarily includes the right to contract, for it is only by the exercise of that right that a person can lawfully acquire property by his own exertion. The right to contract cannot be taken away without "due process of law."²

The right to contract, however, is not an absolute right, but may be subjected to restraints demanded by the welfare of the State.³ The Fourteenth Amendment does not conflict

¹ See *United States v. Joint Traffic Ass'n*, 171 U. S. 566 (1898), (19 Sup. Ct. Rep. 25).

² *Leep v. St. Louis, etc. R. Co.*, 58 Ark. 407 (1894), (25 S. W. Rep. 75).

Ritchie v. People, 155 Ill. 98 (1895), (40 N. E. Rep. 454): "This right to contract which is thus included in the fundamental rights of liberty and property cannot be taken away without 'due process of law.'"

Commonwealth v. Perry, 155 Mass. 117 (1891), (28 N. E. Rep. 1126): "The right to acquire, possess and protect property includes the right to make reasonable contracts, which shall be under the protection of the law."

In re Grice, 79 Fed. 627 (1897): "One of the most sacred rights of liberty is the right to contract. All of the rights of contract which are necessary for the carrying on of ordinary business affairs are protected by the constitution and are not capable of being restrained by legislative action."

"The third absolute right, inherent in every Englishman, is that of property, which consists in the free use, enjoyment and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." 1 Black. Com. 138.

³ In *Frisbie v. United States*, 157 U. S. 165 (1895), (15 Sup. Ct. Rep.

with the exercise of the State's police power.¹ As said by Mr. Justice Field in *Barbier v. Connolly*:² "Neither the amendment—broad and comprehensive as it is—nor any other amendment was designed to interfere with the power of the State, sometimes called its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity."

The question, therefore, whether a State statute regulating the right to combine³—a form of the right to contract—contravenes the provisions of the Fourteenth Amendment guaranteeing the right of property, depends upon whether it was enacted in the legitimate exercise of the police power of the State.

§ 409. **Validity of State Statutes tested by Fourteenth Amendment — (B) Police Power of the State.**—The police power of

586), Mr. Justice Brewer said: "While it may be conceded that, generally speaking, among the inalienable rights of the citizen is that of the liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor, the right to assume any obligations, except for the necessities of existence; to the common carrier, the power to make any contract releasing himself from negligence, and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy."

See also *Knoxville Iron Co. v. Harbison*, 183 U. S. 20 (1901); *St. Louis, etc. R. Co. v. Paul*, 173 U. S. 408 (1898), (19 Sup. Ct. Rep. 419); *Orient Ins. Co. v. Daggs*, 172 U. S. 565 (1898), (19 Sup. Ct. Rep. 281); *Hooper v. California*, 155 U. S. 658 (1895), (15 Sup. Ct. Rep. 207); *Leep v. St. Louis, etc. R. Co.*, 58 Ark. 407 (1894), (25 S. W. Rep. 75).

¹ *Davis v. Massachusetts*, 167 U. S. 43 (1897), (17 Sup. Ct. Rep. 731); *Jones v. Brim*, 165 U. S. 180 (1897), (17 Sup. Ct. Rep. 282); *Covington, etc. Turnpike Co. v. Sandford*, 164 U. S. 592 (1896), (17 Sup. Ct. Rep. 198); *Giozza v. Tiernan*, 148 U. S. 657 (1893), (13 Sup. Ct. Rep. 721); *Mugler v. Kansas*, 123 U. S. 623 (1887), (8 Sup. Ct. Rep. 273); *Barbier v. Connolly*, 113 U. S. 27 (1885), (5 Sup. Ct. Rep. 357).

² *Barbier v. Connolly*, 113 U. S. 31 (1885), (5 Sup. Ct. Rep. 357).

³ "A man has a constitutional right to buy anything, or any quantity, provided he use only fair means, and set his own price on it, or refuse to sell it at all. And what one man may do as an individual, two or more may do when combined as partners. Combination for business purposes is legal. Combinations are beneficial as well as injurious, according to the motives or aims with which they are formed. It is therefore impossible to prohibit all combinations. The prohibition must rest upon the objectionable character of the objects of the combination." *Tiedeman Lim. Police Power*, 244.

the State may be broadly defined as that inherent and plenary power which enables it to interdict that which is prejudicial to the welfare of society. It has been aptly termed "the law of overruling necessity."¹

The State, in the exercise of its police power, may enact "all such laws not in plain conflict with some provision of the State or Federal Constitutions as may rightfully be deemed necessary or expedient for the safety, health, morals, comfort and welfare of the people."²

Laws against combinations for the purpose of restrict-

¹ *Town of Lakeview v. Rose Hill Cemetery Co.*, 70 Ill. 191 (1873).

The police power of the State extends not only over matters relating to the health, morals and safety of the public, but over whatever relates to the public comfort and convenience. *Lake Shore, etc. R. Co. v. Ohio*, 173 U. S. 285 (1899), (19 Sup. Ct. Rep. 465).

"The police of a State, in a comprehensive sense, embraces its whole system of internal regulation by which the State seeks not only to preserve the public order and to prevent offences against the State, but also to establish, for the intercourse of citizens with citizens, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as reasonably consistent with a like enjoyment of rights by others." *Cooley's Const. Lim.* (4th ed.) 713.

Thorpe v. Rutland, etc. R. Co., 27 Vt. 149 (1855), (Redfield, C. J.): "The police power of the State extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the State."

Commonwealth v. Alger, 7 Cush. (Mass.) 84 (1851), (Shaw, C. J.): "The power we allude to is rather the police power; the power vested in the legislature by the constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or

without, not repugnant to the constitution as they shall judge to be for the good and welfare of the Commonwealth and of the subjects of the same."

New Orleans Gas Light Co. v. Hart, 40 La. Ann. 474 (1888), (4 So. Rep. 215): "Police power is the right of the State functionaries to prescribe regulations for the good order, peace, protection, comfort and convenience of the community which do not encroach on the like power vested in Congress by the Federal Constitution."

Mayor, etc. of New York v. Miln, 11 Pet. (U. S.) 139 (1837): "Every law comes within this description [a police regulation] which concerns the welfare of the whole people of the State, or any individual within it, whether it relates to their rights or their duties; whether it respects them as men or citizens of the State, whether in their public or private relations; whether it relates to the rights of persons or of property of the whole people of the State, or of any individual within it; and whose operation is within the territorial limits of the State, and upon the persons and things within its jurisdiction."

² In *Knoxville Iron Co. v. Harbison*, 183 U. S. 20 (1901), the Supreme Court of the United States quotes with approval the extract in the text from the decision of the Supreme Court of Tennessee in the same case, *sub nom. Harbison v. Knoxville Iron Co.*, 103 Tenn. 421 (1900), (53 S. W. Rep. 955).

ing production, maintaining prices or suppressing competition, have a relation to the end of all police regulations — the comfort, welfare or safety of society.¹ The preservation of competition is clearly within the police power of the State.

In the absence of statutory provisions, the law leaves combinations inimical to public policy as it finds them, and contents itself with declining to recognize or enforce them. Statutes re-enforcing the common law, defining the rules of public policy, and making criminal illegal combinations, are, undoubtedly, valid.

The power of police, however, is not confined to providing additional penalties for forming combinations previously unlawful. Any statute, having for its object the preservation of competition and prohibiting all agreements or combinations, the direct effect of the operation of which may be the restriction of competition, is undoubtedly constitutional, although it goes much further than the common law.² The

¹ *Ritchie v. People*, 155 Ill. 98 (1895), (40 N. E. Rep. 454): "The police power of the State is that power which enables it to promote the health, comfort, safety and welfare of society. It is very broad and far-reaching, but it is not without its limitations. Legislative acts passed in pursuance of it must not be in conflict with the constitution, and must have some relation to the ends sought to be accomplished,—that is to say, to the comfort, welfare or safety of society."

² In the following cases the anti-trust statutes of the several States designated have been held to have been enacted in the exercise of the police power of the State and not to unconstitutionally infringe the right to contract:

Missouri. State v. Firemen's Fund Ins. Co., 152 Mo. 46 (1899), (52 S. W. Rep. 595): "There is no such thing in civilized society as unrestrained power to contract. Every man surrenders some of his individual rights when he associates with or becomes a part of any society or government, and the power

of the government to legislate is complete, so that while according to every man the fullest possible liberty to do what he pleases with his own, he must not interfere with the similar right of others. This principle underlies and runs through all government and societies, and it is the corner-stone of the police power of the State."

Ohio. State v. Buckeye Pipe Line Co., 61 Ohio State St. 547 (1900), (56 N. E. Rep. 464): "The definite proposition of counsel upon this point is that although the act is an exercise of legislative power, it transcends the provisions of the State and federal constitutions which render inviolable the rights of liberty and property, which include the right to make contracts. It would be difficult to place too high an estimate upon these guaranties, and include the right to make contracts. But it is settled that these guaranties are themselves limited by the public welfare or the exercise of the police power. Although that power may not be conclusively defined, its nature and attributes

wisdom or policy of its provisions is a matter for legislative determination.¹ But any statute which takes away the right to contract entirely, or which prohibits acts or agreements which can have no direct effect upon competition, is undoubtedly unconstitutional.²

have been the subject of much investigation. In all considerate discussions of the subject it is conceded that, in the exercise of this power, the legislature can prohibit only those uses of property which are hurtful to the public, and the inhibited use must be hurtful in a legal sense. That contracts like these are hurtful in that sense has been held in more cases than it would be practicable to cite."

Tennessee. State v. Schlitz Brewing Co., 104 Tenn. 715 (1900), (59 S. W. Rep. 1039): "The right of contract is confessedly an inherent part of both the right of 'liberty,' and the right of 'property,' and deprivation of it is therefore equally forbidden by that provision, but none of them are unrestricted rights. All are subject to the law's control, and may be abridged or even destroyed within constitutional bounds."

Texas. Waters-Pierce Co. v. State, 19 Tex. Civ. App. 1 (1898), (44 S. W. Rep. 940): "By adequate laws, looking to the suppression of evil, the State, through the exercise of its police power, must necessarily restrain the unbridled license of the citizen in his conduct and use of property, and restraints in this way have never been held to illegally impair his liberty. . . . The objection to the statutes, that they deprive the owner of his property without due process of law, is equally untenable. It was not the design of the Fourteenth Amendment of the Constitution of the United States to interfere with a just and proper exercise of the police power by the States. . . . If legislative authority exists to restrain the conduct of owners in a particular way in the use of property, deemed injurious to the public welfare, and the legislature having acted in the manner required, in passing

laws, due process of law exists, in so far as it is necessary to find legal authority for prohibiting the act. Legal restraint imposed upon the use of property does not deprive the owner of it without due process of law."

See also *Houck v. Anheuser-Busch Brewing Ass'n*, 88 Tex. 184 (1894), (30 S. W. Rep. 869); *Texas Brewing Co. v. Anderson* (Tex. Civ. App. 1897), 40 S. W. Rep. 737; *Texas Brewing Co. v. Durram* (Tex. 1898), 46 S. W. Rep. 880.

¹ *Waters-Pierce Co. v. State*, 19 Tex. Civ. App. 1 (1898), (44 S. W. Rep. 940): "When it is once admitted that a matter is a subject, of police supervision, the expediency and wisdom of the means resorted to are subjects solely confided to the legislative department of the State, subject, however, to limitations imposed by the organic law of the nation."

² In *In re Grice*, 79 Fed. 627 (1897), Judge Swain held the Texas anti-trust act unconstitutional upon the ground, among others, that it abridged the liberty of contract. The judge said, in his opinion: "The act also prohibits combinations which create or carry out restrictions in trade. It has never been held that all restrictions in trade were illegal or contrary to public policy. The rule is well settled that when a contract is publicly oppressive, and the restrictions broader than necessary for the legitimate protection of the other party to be benefited by the contract, then the contract is void; otherwise it is legal. The fault of the act in regard to restraint of trade is the same in regard to competition. It makes no distinction between legal and illegal combinations and agreements which prevent competition. Those which have always been held legal, and which have

The power of Congress, under the Fifth Amendment, to regulate the right of contract is the same as that of a State, under the Fourteenth Amendment.¹ The decisions, therefore, of the Supreme Court of the United States, that the federal anti-trust law is constitutional, although prohibiting all contracts and combinations in restraint of trade, whether reasonable or unreasonable, would seem to afford a safe guide for State legislation.²

§ 410. **Validity of State Statutes tested by Fourteenth Amendment — (C) Class Legislation.** — The Fourteenth Amendment, in its concluding clause, provides that no State shall “deny to any person within its jurisdiction the equal protection of the laws.”

This provision operates against arbitrary class legislation. State legislatures, in the exercise of the police power, may enact laws applying to particular classes of persons, when the nature of their business or occupation is such that its regulation is necessary for the protection of the public. The nature of the occupation is the controlling factor. Any

always been an essential part of the liberty of the citizen, are made criminal, equally with those which the law has always condemned.”

In this respect, however, the fault is rather in the opinion than in the statute, for it is directly opposed to the principle of the decisions of the Supreme Court of the United States, cited in a note following, that the federal anti-trust statute prohibits contracts in restraint of trade not previously illegal. The decision of Judge Swain is in line with the decisions of the lower courts upon the federal statute, which were overruled in the cases referred to. The order in this case was reversed by the Supreme Court in *Baker v. Grice*, 169 U. S. 284 (1898), (18 Sup. Ct. Rep. 323), but the Court declined to pass upon the constitutional questions.

In *Niagara Fire Ins. Co. v. Cornell*, 110 Fed. 817 (1901), it was held that the Nebraska anti-trust statute was unconstitutional, because it deprived persons of the liberty to make and enforce

contracts. The reasoning of the Court is, however, inconclusive.

¹ *Fifth Amendment*: “No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

Fourteenth Amendment: “Nor shall any State deprive any person of life, liberty or property without due process of law.”

² *Addyston Pipe, etc. Co. v. United States*, 175 U. S. 226 (1899), (20 Sup. Ct. Rep. 96); *United States v. Joint Traffic Ass’n*, 171 U. S. 571 (1898), (19 Sup. Ct. Rep. 25); *United States v. Trans-Missouri Freight Ass’n*, 166 U. S. 328 (1897).

The fact that Congress has, by the Constitution, power to regulate interstate commerce, cannot affect the principle stated in the text. The States have inherent power to regulate domestic commerce.

classification, however, must rest upon a reasonable basis. A statute which arbitrarily classifies denies the equal protection of the laws to those against whom it discriminates.

In prescribing regulations for the conduct of domestic trade, the legislature cannot exempt from their operation persons engaged in a particular branch of industry. A statute distinguishing between producers and dealers—declaring that the former may combine and that the latter may not—is unconstitutional.

Upon these principles, the anti-trust statutes containing a provision that they “shall not apply to agricultural products or live stock while in the hands of the producer or raiser”—or a similar provision¹—are clearly invalid.² As such a

¹ The exemption, in the precise form stated in the text, or with the word “possession” in place of the word “hands,” appears in the following anti-trust statutes:

Georgia: Act of Dec. 23, 1896 (Sess. Laws 1896, p. 69).

Illinois: Act of June 20, 1893.

Indiana: Act of March 5, 1897 (Horner's Anno. Stat. 1901, § 7557).

Louisiana: Act of July 7, 1892 (Rev. Laws 1897, p. 205).

Michigan: Comp. Laws 1897, § 11,382.

Tennessee: Act of April 30, 1897 (Laws 1897, ch. 94).

Texas: Act of April 30, 1895, § 12.

The *Mississippi* act of 1892 (Code 1892, § 4437), provided that “it should not apply to the associations of those engaged in husbandry in their dealings with commodities in the hands of the producer.” This provision, however, was omitted from the later *Mississippi* statute.

The *Montana* Code (ch. 8, § 325) provides: “The provisions of this chapter do not apply to . . . persons engaged in horticulture or agriculture with a view of enhancing the price of their products.”

In *North Carolina*, the act (Laws 1899, ch. 666) exempts agricultural products in the hands of producers, the lumber

interests, cotton and woollen mills, the fishing, trucking, and canning industries, and merchants not interested in a “trust”—also “combinations of consumers to protect themselves against imposition in the cost of articles for their own use.”

All of the statutes containing these exemptions are, undoubtedly, unconstitutional.

² *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540 (1902), affirming 99 Fed. 354 (1900), (holding *Illinois* statute unconstitutional); *In re Grice*, 79 Fed. 627 (1897), (holding *Texas* statute unconstitutional). See also *Niagara Fire Ins. Co. v. Cornell*, 110 Fed. 816 (1901). Also *Merz Capsule Co. v. United States Capsule Co.*, 67 Fed. 414 (1895), where the constitutionality of the *Michigan* anti-trust statute was considered, but not determined. *Contra*: *State v. Schlitz Brewing Co.*, 104 Tenn. 715 (1900), (59 S. W. Rep. 1033, 78 Am. St. Rep. 941), (holding *Tennessee* statute constitutional); *Waters-Pierce Oil Co. v. State*, 19 Tex. Civ. App. 1 (1898), (44 S. W. Rep. 943), (holding *Texas* statute constitutional).

In *State v. Shipper's Compress, etc. Co.* (decided in April, 1902, and not yet reported), the *Texas* Court of Civil Appeals, however, following the decision in *Connolly v. Union Sewer Pipe*

provision is, essentially, a condition to the operation of the statute as a whole, its presence renders the entire statute unconstitutional. The condition could not be stricken out without rendering the statute operative against the very persons the legislature desired to exempt.¹

In the very recent case of *Connolly v. Union Sewer Pipe Co.*,² the Supreme Court of the United States, in declaring unconstitutional the Illinois anti-trust statute of 1893, because it contained the exemption above referred to, said, through Mr. Justice Harlan: "We have seen that under that statute *all* except producers of agricultural commodities and raisers of live stock, who combine their capital, skill or acts for any of the purposes named in the act, may be punished as criminals, while agriculturists and live-stock raisers, in respect of their products or live stock in hand, are exempted from the operation of the statute, and may combine and do that which, if done by others, would be a crime against the State. The statute so provides, notwithstanding, persons

Co. supra, declared the Texas anti-trust statutes unconstitutional. The Court said: "The effect of the act of 1899 was not only to keep alive section 12 of the act of 1895 but, in effect, also to make that provision of the law a part and parcel of the act of 1899. Our laws upon the subject of trusts, retaining as a part of their terms that provision of the statute which excepts from the general operation of the law producers and raisers of livestock, and agricultural products and labor organizations, renders the entire law upon that subject void and unconstitutional. This provision relieves from the operation of the law certain classes, which the Supreme Court of the United States, in the case cited, decided should be included, in order that all provisions of the law might bear alike upon all who could be guilty of the acts denounced. The vice in the statute, as illustrated in the case cited, permeates to all of its four corners; and there is no possible rule known to this court by which any of the provisions of the anti-trust statute

can be kept alive, so as to relieve it from the operation of section 12 of the act of 1895. Therefore, relying upon the authority cited, we must hold the statute unconstitutional, and so much of the plaintiff's action as based thereon must fail."

¹ *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540 (1902), *affirming* 99 Fed. 354 (1900). In the latter decision Judge Kohlsaat said: "It is urged that, granting the unconstitutionality of said ninth clause, yet it may be declared void without affecting the validity of the remaining clauses of said act. If this were so, then by declaring said clause void, the courts would make the act binding upon those classes of persons within the State which the legislature had especially exempted from its provisions. This would be judicial legislation of the most flagrant character. In my opinion, the said clause nine taints the whole act, and renders it all void."

² *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 556 (1902).

engaged in trade or in the sale of merchandise or commodities, within the limits of a State, and agriculturists and raisers of live stock, are all in the same general class, that is, they are all alike engaged in domestic trade, which is, of right, open to all, subject to such regulations applicable alike to all in like conditions, as the State may legally prescribe. . . . If combinations of capital, skill or acts, in respect of the sale or purchase of goods, merchandise or commodities, whereby such combinations may, for their benefit exclusively, control or establish prices, are hurtful to the public interests and should be suppressed, it is impossible to perceive why like combinations in respect of agricultural products and live stock are not also hurtful. Two or more engaged in selling dry goods, or groceries, or meats, or fuel, or clothing, or medicines, are, under the statute, criminals, and subject to a fine, if they combine their capital, skill or acts for the purpose of establishing, controlling, increasing or reducing prices, or of preventing free and unrestrained competition amongst themselves or others in the sale of their goods or merchandise; but their neighbors, who happen to be agriculturists and live-stock raisers, may make combinations of that character in reference to their grain or live stock without incurring the penalty. Under what rule of permissible classification can such legislation be sustained as consistent with the equal protection of the laws? It cannot be said that the exemption made by the ninth section of the statute was of slight consequence, as affecting the general public interested in domestic trade and entitled to be protected against combinations formed to control prices for their own benefit; for it cannot be disputed that agricultural products and live stock in Illinois constitute a very large part of the wealth and property of that State. . . . To declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the State for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations,

but may combine their capital, skill or acts to destroy competition, and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further argument . . . [is] unnecessary. . . . Looking at all the sections together, we must hold that the legislature would not have entered upon the policy indicated by the statute unless agriculturists and live-stock dealers were excluded from its operation, and were thereby protected from prosecution. The result is that the statute must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional, as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the ninth section."

The Nebraska anti-trust statute has also been held to be unconstitutional,¹ upon the ground that, by excepting labor organizations from its provisions, it denies the equal protection of the laws to all persons not members of such organizations.²

¹ *Niagara Fire Ins. Co. v. Cornell*, 110 Fed. 825 (1901): "The statute expressly excepts from its provisions assemblies or associations of laboring men. By saying that associations of laboring men are exempt from the provisions of the statute, it is thereby stated, in meaning, that unorganized labor must pay the penalties of a criminal statute for an act done by a member of an organization, and by him done with impunity. On one side, by this legislation, we have organized labor. Those men are not amenable to the statute. On the other side we have men who do not belong to organized labor, — farmers, merchants, professional men, laborers, as well as all others. They are amenable, and by this statute that is called 'equal protection.' I do not believe it."

² See the following exemptions in anti-trust statutes:

Illinois. Act of June 11, 1891: "Provided, however, that in the mining, manufacture, or production of articles of merchandise, the cost of which is

mainly made up of wages, it shall not be unlawful for persons, firms and corporations doing business in this State to enter into joint arrangement of any sort, the principal object or effect of which is to maintain or increase wages."

Louisiana. Act of July 7, 1892: "That the provisions of the act shall not be construed as to effect . . . any combination or confederation of laborers for the purpose of increase of their wages or redress of grievances."

Michigan. Act of July 1, 1889: "The provisions of this act shall not apply to . . . the services of laborers or artisans who are formed into societies or organizations for the benefit and protection of their members."

Mississippi. Code 1892 (as amended), § 4437: "But this shall not apply to . . . societies of artisans, employees, and laborers, formed for the benefit and protection of their members."

Montana. Code 1895, § 325: "The provisions of this chapter do not apply to any arrangement, agreement, or combination between laborers made

CHAPTER XLII.

CONSTRUCTION AND APPLICATION OF STATE ANTI-TRUST
STATUTES.

§ 411. Rule of Construction.

§ 412. Statutes not Regulations of Interstate Commerce.

§ 413. Application of Statutes to Insurance Combinations.

§ 414. Applicability of Statutes to Foreign Corporations doing Business in State.

§ 415. Statutes have no Extraterritorial Effect.

§ 416. Statutes not retroactive, but apply to Continuing Combinations.

§ 417. Construction and Application of Miscellaneous Statutes.

§ 411. Rule of Construction. — State anti-trust statutes, being penal in their nature, must be strictly construed. Their meaning cannot be extended by implication. It must be determined from the language used.¹

§ 412. Statutes not Regulations of Interstate Commerce. — It has been held that it is neither the purpose nor the effect of the Texas anti-trust acts to regulate, in any degree, inter-

with the object of lessening the hours of labor or increasing wages."

Nebraska. Act of April 8, 1897, § 9: "Nothing herein contained shall be construed to prevent any assemblies or associations of laboring men from passing and adopting such regulations as they may think proper in reference to wages and the compensation of labor."

South Dakota. Act of March 1, 1897: "Provided that nothing in this act shall be so construed as to include labor organizations."

Texas. Act of 1895, § 12: "Provided . . . this act shall not be . . . understood or construed to prevent the organization of laborers for the purpose of maintaining any standard of wages."

¹ In *State v. Lancashire Fire Ins. Co.*, 66 Ark. 472 (1899), (51 S. W. Rep. 633), the Supreme Court of Arkansas in construing the anti-trust statute of that State (*per* Riddick, J.), said: "To determine the meaning of a statute, the

courts must look mainly to the language of the act itself; for that is the final expression of the legislative will, and therein must such will and intention be sought. Whatever the legislature may have intended, such intention can have no effect unless expressed in the statute; for this, being a penal statute, cannot be extended by implication. It would be in the highest degree unjust to punish conduct not clearly forbidden by the law itself . . . and so, to quote the words of a recent opinion of the Supreme Court of the United States, 'we are left to determine the meaning of this act, as we determine the meaning of other acts, from the language used therein.'" Citing *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 318 (1897), (17 Sup. Ct. Rep. 540).

See also *State v. Associated Press*, 159 Mo. 410 (1901); *State v. Firemen's Fund Ins. Co.*, 152 Mo. 1 (1899), (52 S. W. Rep. 595).

state commerce; that they are applicable only to domestic commerce and affect articles imported into the State only after they have been delivered, and have ceased to be the subject of interstate commerce.¹

These principles, undoubtedly, govern the application of the State statutes in general.

§ 413. **Application of Statutes to Insurance Combinations.** — The anti-trust statutes of several States include, in express terms, combinations of insurance companies designed to prevent competition and maintain rates.² In other States, the question has been judicially considered whether such a combination comes within the general provisions of the State statute.

An Iowa statute³ prohibited the formation of combinations to regulate or fix the price of "oil, lumber, coal . . . or any other commodity." The Supreme Court of Iowa held that insurance was a "commodity" within the meaning of this statute, and that a combination of insurance companies was prohibited by its provisions.⁴ On the other hand, the Supreme Court of Texas held that the term "commodity," in the Texas statute of 1889, did not include insurance, and that a combi-

¹ *Waters-Pierce Co. v. State*, 19 Tex. Civ. App. 1 (1898), (44 S. W. Rep. 945): "It was decided in the case of *Fuqua v. Pabst Brewing Co.*, 90 Tex. 298 (1897), (38 S. W. Rep. 29), that it was not the purpose of these statutes to undertake, in any way, to regulate or to prohibit transactions of interstate commerce, and it was clearly proper for the court to give to the statute this application. If the statute could be applied to domestic commerce, and transactions occurring within the limits of this State, the court could give it application, and its inability to extend it to matters of interstate commerce would not affect its powers in this respect." See also decision of Supreme Court of the United States in same case, 177 U. S. 43 (1900), (20 Sup. Ct. Rep. 518); also *Pasteur Vaccine Co. v. Burkey*, 22 Tex. Civ. App. 232 (1899) (54 S. W. Rep. 804).

² The anti-trust statutes of *Arkansas*,

Kansas (earliest statute), *Missouri*, *Nebraska* and *Texas* (Act of 1899), expressly include insurance combinations. The *South Carolina* statute clearly refers to them. See statutes collected in note to § 405, *ante*.

For construction of provisions of Missouri statute relating to insurance companies, see *State v. Firemen's Fund Ins. Co.*, 152 Mo. 1 (1899), (52 S. W. Rep. 595).

³ McClain's Iowa Code, § 5454.

⁴ *Beechley v. Mulville*, 102 Iowa, 602 (1897), (70 N. W. Rep. 107, 63 Am. St. Rep. 479).

The word "trade" in the title of an act fairly includes the provisions of the act concerning insurance, and such an act is valid in a State where the subject of an act must be clearly expressed by its title. *In re Pinkney*, 47 Kan. 89 (1891), (27 Pac. Rep. 179).

nation of fire insurance companies to establish uniform rates did not contravene the act.¹ The decision in the Iowa case cannot be regarded as sound. It ignores the *ejusdem generis* rule of construction. The term "commodity," in its broadest sense, may include insurance, but it is not a commodity of the same general class or nature as those commodities previously mentioned in the Iowa statute.

The word "property," as used in the Kentucky anti-trust statute, "does not include the right to enter into a contract of insurance nor to fix the terms upon which such a contract will be made."²

Insurance is a "business," the control of which cannot be placed in the power of trustees, within the meaning of the Mississippi statute.³

§ 414. **Applicability of Statutes to Foreign Corporations doing Business in State.** — A corporation created by the laws of one State has no absolute right to transact business beyond its borders. Its privileges in other States are permissive and depend upon the comity between States. A State, in admitting foreign corporations, may impose any conditions, reasonable or unreasonable, which it deems expedient.⁴

¹ *Queen Ins. Co. v. State*, 86 Tex. 250 (1893), (24 S. W. Rep. 397). To meet this decision the word "business" was inserted in the Texas act of 1895.

² *Ætna Ins. Co. v. Commonwealth*, 21 Ky. Law Rep. 503 (1899), (51 S. W. Rep. 624): "While it may be admitted that a contract, either for labor or for indemnity against contingent loss, like an insurance contract, when executed, becomes property, because it is then a *chose in action*, the right to enter into such contracts, which belongs to all persons capable of contracting — as well natural persons as artificial ones authorized by their organic law to make such contracts — would hardly be considered to be included in the word 'property,' unless that word were used in a much broader sense than it is customarily used by lawyers or in statutes."

³ *American Fire Ins. Co. v. State*, 75 Miss. 24 (1897), (22 So. Rep. 99): "It

[the statute] prohibits any trust the object of which is to place the control of business (any business) to any extent in the power of trustees. The law-makers wisely refrained from any specification of, or attempt to enumerate, the kinds of business whose control should thus be placed in the power of trustees, for the obvious reason that such kinds of business in modern life are multiform. It, therefore, prohibited any trust whose object was to place the control of any business in the power of trustees, when the effect of such trust should be to injure the public or any particular person or corporation in this State. Such legislation has become very general in the United States owing to the pernicious results of such trusts."

⁴ *Hartford Fire Ins. Co. v. Raymond*, 70 Mich. 501 (1888), (38 N. W. Rep. 474): "It has been repeatedly held, . . . that corporations of one State have

A foreign corporation doing business in a State is subject to its general laws and regulations. It cannot exercise, within the State, powers prohibited in the case of corporations generally. Statutes against combinations of corporations apply to foreign as well as domestic corporations. Foreign corporations violating their provisions may be ousted from the State.¹

In *Waters-Pierce Oil Co. v. Texas*² the Supreme Court of the United States, in holding that a Texas anti-trust statute applied to foreign corporations, and that their privilege of transacting business within the State might be forfeited for disobeying it, said: "The plaintiff in error is a foreign corporation, and what right of contracting has it in the State of Texas? This is the only inquiry, and it cannot find an answer in the rights of natural persons. It can only find an answer in the rights of corporations and the power of the State over them. What those rights are and what that power is has often been declared by this court. A corporation is the creature of the law, and none of its powers are

no right to exercise their franchises in another State except upon the assent of such other State, and upon such terms as may be imposed by the State where their business is to be done. The conditions imposed may be reasonable or unreasonable; they are absolutely within the discretion of the legislature."

¹ *United States: Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28 (1900), (20 Sup. Ct. Rep. 518).

Illinois: Harding v. American Glucose Co., 182 Ill. 551 (1899), (55 N. E. Rep. 577, 74 Am. St. Rep. 189). See also *Bishop v. American Preservers Co.*, 157 Ill. 284 (1895), (41 N. E. Rep. 765).

Kansas: State v. Phipps, 50 Kan. 619 (1893), (31 Pac. Rep. 1097): "The State has power to regulate and control, and to provide penalties for the transgression of its regulating and controlling statutes, the business of a foreign insurance company within its borders."

Missouri: National Lead Co. v. Grote Paint Store Co., 80 Mo. App. 247 (1899):

"Neither can the plaintiff shut off an investigation of its corporate organization and purpose upon the plea of comity due it as a foreign corporation. The doctrine on this subject is simple and clear. It concedes no rights to a corporation of a sister State which are denied by law to a domestic corporation, or which are contrary to the laws or public policy of the State into which the foreign corporation enters for business."

Tennessee: State v. Schlitz Brewing Co., 104 Tenn. 715 (1900), (59 S. W. Rep. 1039, 78 Am. St. Rep. 941).

Texas: Waters-Pierce Oil Co. v. State, 19 Tex. Civ. App. 1 (1898), (44 S. W. Rep. 936), *affirmed*, *Waters-Pierce Oil Co. v. Texas*, *supra*.

That foreign corporations may attack constitutionality of State anti-trust statute, see *Niagara Fire Ins. Co. v. Cornell*, 110 Fed. 816 (1901).

² *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 43 (1900), (20 Sup. Ct. Rep. 518).

original. They are precisely what the incorporating act has made them, and can only be exerted in the manner which that act authorizes. In other words, the State prescribes the purposes of a corporation and the means of executing those purposes. Purposes and means are within the State's control. This is true as to domestic corporations. It has even a broader application to foreign corporations. *Bank of Augusta v. Earle*¹ involved the power of the Bank of Augusta, chartered by the State of Georgia, and invested by its charter with a function of dealing in bills of exchange, to exercise that function in the State of Alabama. In passing on the question certain principles were declared which have never since been disturbed. A contract of the corporation, it was declared, is the contract of the legal entity, and not of its individual members. Its rights are those given to it in that character, and not the rights which belong to its constituent citizens. Its charter confers its powers and the means of executing them, and such powers and means can only be exercised in other States by the permission of the latter."

§ 415. **Statutes have no Extraterritorial Effect.** — The penal statutes of a State have no binding effect outside its borders. A law attempting to make criminal, acts done without the State is void.² The State may, however, make criminal and unlawful the carrying into effect within its limits of a combination entered into without.

¹ Citing *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519 (1839).

² *In re Grice*, 79 Fed. 638 (1897): "The fifth paragraph of the said act, in which it is attempted to claim jurisdiction for offences committed outside of the State of Texas, is so absurd that a denial thereof is scarcely necessary. . . . It has been properly suggested that, should this feature of this act be carried out and administered, it would be unnecessary for any other State or the nation at large to have any other laws upon the subject, as all persons within the limits of the United States could be regulated in their dealings and in the conduct of their business according to

the wishes of the legislature of Texas. The State, in its criminal jurisdiction as to acts committed within its own boundaries, and within the limits prescribed by the federal constitution, is sovereign, and its process should not be interfered with where it does not contravene the said constitution; but, beyond the boundaries of the State, it has no more authority in New York, Missouri, or Ohio than it has in Great Britain or Austria, and that part of the act which proposes this extraterritorial jurisdiction is absolutely null and void."

See also *State v. Associated Press*, 159 Mo. 410 (1901).

In the construction of an anti-trust statute, it will be presumed that the legislature recognized these elementary principles, and intended "that its statutes should not apply to acts or contracts done or effected beyond the limits of the State, and having no reference to or effect upon persons or property in this State."¹

§ 416. **Statutes not retroactive, but apply to Continuing Combinations.** — An act² making it unlawful for a corporation to enter a combination for certain purposes, and imposing penalties for its violation, is not retroactive and does not deprive a corporation, infringing its provisions, of the right to enforce its antecedent contracts.³

The object of anti-trust statutes, however, is to prevent the existence of combinations of the nature prohibited, and, while not retroactive, the effect of their enactment, as a general rule, is to prevent the continuance of existing, and the formation of new, combinations in contravention of their provisions.⁴

§ 417. **Construction and Application of Miscellaneous Statutes.** — A corporation organized for the purpose of acquiring patents and granting licenses thereunder, and which has acquired nearly all the patents covering a particular article, but which does not bind its licensees as to prices or output, is not in contravention of the Illinois anti-trust statute.⁵ This statute is, however, applicable to a corporation formed for the purpose of carrying out an illegal combination of its stockholders.⁶

A Nebraska statute⁷ forbidding combinations entered into

¹ *State v. Lancashire Fire Ins. Co.*, 66 Ark. 472 (1899), (51 S. W. Rep. 633), (*per* Riddick, J.).

² See *Indiana* statute in note to § 405, *ante*: "*The Statutes. Scope of State Legislation.*"

³ *Sterling Remedy Co. v. Wyckoff*, 154 Ind. 437 (1900), (56 N. E. Rep. 911).

⁴ *Matter of Davies*, 168 N. Y. 89 (1901). See also *ante*, § 395: "*Statute [federal] not retroactive, but applies to Continuing Combinations.*"

⁵ *Columbia Wire Cloth Co. v. Freeman Wire Co.*, 71 Fed. 302 (1895). See also *Clark v. Cline Woven Wire Fence Co.* (Tex. 1899), 54 S. W. Rep. 392.

Compare *National Harrow Co. v. Bement*, 21 App. Div. (N. Y.) 290 (1897), (47 N. Y. Supp. 462). And see *ante*, § 361: "*Associations of Manufacturers owning Patents.*"

⁶ *Ford v. Chicago Milk Shippers' Ass'n*, 155 Ill. 166 (1895), (39 N. E. Rep. 651).

⁷ *Nebraska: Sess. Laws 1889, ch. 69.*

by persons "engaged in manufacturing, selling or dealing in the same or any like manufactured or natural products," does not apply to persons engaged in the laundry business.¹

The New York statute of 1897² against combinations is disjunctive, and prohibits corporations from combining to accomplish three things: (1) The "creation of a monopoly;" (2) "the unlawful restraint of trade;" and (3) "the prevention of competition in any necessary of life."³

Decisions, other than those already cited, construing anti-trust statutes of different States, are collected in the footnote and are arranged under the names of the respective States.⁴

¹ *Downing v. Lewis*, 56 Neb. 386 (1898), (74 N. W. Rep. 900).

² *New York: Laws* 1897, ch. 384, § 7.

³ *National Harrow Co. v. Bement*, 21 App. Div. (N. Y.) 290 (1897), (47 N. Y. Supp. 462). Regarding the construction and validity of the New York statute of 1899 the New York Court of Appeals said in *Matter of Davies*, 168 N. Y. 101 (1901): "The general purpose of the act is expressed in its first section. Its object is to destroy monopolies in the manufacture, production and sale in this State of commodities in common use, to prevent combinations in restraint of competition in the supply or price of such commodities, or in restraint of the free pursuit of any lawful business, trade or occupation. The act in this respect is little more than a codification of the common law upon the subject, and its validity, to this extent, is not and cannot be successfully

questioned in view of a long line of authorities."

⁴ *Arkansas: State v. Aetna Fire Ins. Co.*, 66 Ark. 480 (1899), (51 S. W. Rep. 638).

Kansas: Barton v. Mulvane, 59 Kan. 313 (1898), (52 Pac. Rep. 883).

Mississippi: Houck v. Wright, 77 Miss. 476 (1900), (27 So. Rep. 616).

New York: Walsh v. Dwight, 40 App. Div. 513 (1899), (58 N. Y. Supp. 91).

Tennessee: Bailey v. Master Plumbers' Ass'n, 103 Tenn. 99 (1900), (52 S. W. Rep. 853).

Texas: San Antonio Gas Co. v. State, 22 Tex. Civ. App. 118 (1899), (54 S. W. Rep. 289); *Columbia Carriage Co. v. Hatch*, 19 Tex. Civ. App. 120 (1898), (47 S. W. Rep. 288); *Patterson v. Crabb*, 51 S. W. Rep. 870 (1899); *Comer v. Burton, etc. Co.*, 58 S. W. Rep. 969 (1900).

CHAPTER XLIII.

RIGHTS, REMEDIES AND PROCEDURE UNDER STATE ANTI-TRUST STATUTES.

- § 418. Invalidity under State Statutes as a Ground of Collateral Attack.
- § 419. Criminal Proceedings.
- § 420. Civil Remedies.
- § 421. Evidence.
- § 422. Statutes of Limitation.
- § 423. Conclusion.

§ 418. **Invalidity under State Statutes as a Ground of Collateral Attack.** — Upon principles considered with respect to illegal combinations in general,¹ and combinations in violation of the federal statute,² the fact that one of the parties to an independent contract is a member of, or is, itself, a combination in violation of a State anti-trust statute, cannot be set up as a defence to an action brought upon the contract. In the absence of an express statutory provision, the validity of a combination must be tested in direct proceedings. Buyers from a combination cannot avoid paying their debts by showing its illegality unless a statute authorizes such procedure.

In several States, however, the anti-trust statutes provide that purchasers of goods from a combination, formed in violation of their provisions, shall not be liable for the purchase price, and may plead the statute as a defence to any action therefor.³ The difficulties attending the application

¹ See *ante*, § 369 : “ *Collateral Attack upon Combination. Remedies upon Independent Contracts.* ”

² See *ante*, § 396 : “ *Invalidity under Federal Statute as a Ground of Collateral Attack.* ”

³ *Illinois*. Act of June 11, 1891 : “ Any purchaser of any article or commodity from any individual, company or corporation transacting business contrary to any provision of the preceding

sections of this act shall not be liable for the price or payment of such article or commodity and may plead this act as a defence to any suit for such price or payment.”

Iowa. Code 1891, § 5064 : Similar to *Illinois* statute, *supra*.

Kansas. Act of March 8, 1897, § 7 : “ When any civil action shall be commenced in any court of this State, it shall be lawful to plead, in defence

of such statutes and the possibility of conflicting adjudications are obvious; but it is not perceived upon what ground they can be declared unconstitutional.¹ Certainly, the obstacles in the way of the practical working of such a statute furnish no ground for the conclusion reached by the federal court, in a recent case, that the illegality of a plaintiff organization can only be pleaded, under such a statute, when it has been previously established in direct proceedings.² This is merely judicial annulment by construction.

thereof, that the plaintiff, or any other person interested in the prosecution of the cases, is at the time or has been, within one year next preceding the date of the commencement of any such action, guilty, either as a principal agent, representative or consignee, directly or indirectly, of a violation of any of the provisions of this act, or that the cause of action grows out of any business transaction in violation of this act."

For construction of earlier statutory provision (Kansas Laws 1889, ch. 257, § 5), that the defendant might plead in bar or abatement that the plaintiff was a member of an unlawful combination or trust, see *Barton v. Mulvane*, 59 Kan. 313 (1898), (52 Pac. Rep. 883).

Kentucky. Stat. 1899, § 3918 (Act of May 20, 1890). Similar to Illinois statute, *supra*.

Missouri. R. S. 1899, § 8970. Similar to Illinois statute, *supra*.

Nebraska. Act of April 8, 1897, § 10. Similar to Illinois statute, *supra*.

Oklahoma. Act of December 25, 1890, § 3. Similar to Illinois statute, *supra*.

Tennessee. Code 1896, § 3189: "When an action at law or suit in equity shall be commenced in any court of this State it shall be lawful, in the defence thereof, to plead in bar or abatement of the action that the plaintiff or any other person or corporation interested in the prosecution of the action is a member or connected with, and the cause of action grows out of some business or transaction with, such trust, pool, contract, agreement, or combination as described."

Texas. Act of May 25, 1899. Similar to Illinois statute, but includes sales by agents, etc.

¹ The statutes have been pleaded and the defences sustained in *National Lead Co. v. Grote Paint Store Co.*, 80 Mo. App. 247 (1899); *Ford v. Chicago Milk Shippers' Ass'n*, 155 Ill. 166 (1895), (39 N. E. Rep. 651, 27 L. R. A. 298). See also *American Strawboard Co. v. Peoria Strawboard Co.*, 65 Ill. App. 502 (1895). Compare, *Wylie v. National Wall Paper Co.*, 70 Ill. App. 543 (1896).

² *Lafayette Bridge Co. v. City of Streator*, 105 Fed. 731 (1900): "The defendant is, in this suit, attempting to avail itself in a collateral proceeding of a defence based on a fact which should be determined in a direct proceeding. In other words, before a defendant can evade the payment of the purchase price of commodities, actually received, on the ground that the seller is a trust or combination, in restraint of trade, in contravention of the statute, there should be an adjudication of a competent tribunal, in a direct proceeding instituted for that purpose, determining that such seller is a trust or combination in the sense contemplated by the statute. This is in accord with the ordinary rules of statutory construction. The practical working of any other rule could not fail to emphasize the justice and necessity of so holding in cases similar to the one at bar. It cannot be insisted that the decision in one case would be binding or even persuasive in any other case. Each suit to recover purchase money, in which the statute is

In *National Lead Co. v. Grote Paint Store Co.*¹ the Court, in holding that the Missouri anti-trust statute might be pleaded, and the illegality of the plaintiff organization — a corporate combination — established, as a defence to an action of debt, said: "It is quite true, as a general rule, that questions affecting the right of a corporation to enjoy its franchise to be a corporation, or its legal entity as such, can only be raised in a direct proceeding to annul or forfeit the grant, to which the State granting the charter is a party, for the reason that, as to third parties, the legality of the corporation is avouched by its charter from the State, which reserves to itself the power to withdraw the franchises bestowed, upon evidence of fraudulent obtentions or subsequent abuse. But the existence of this rule of procedure cannot deprive the legislature of the power of enacting that inquiries affecting the validity of the charter of a corporation may be made in other proceedings than by an action in the name of the State, and this is just what was done when the anti-trust act pleaded in defendant's answer became the law of this State. . . . As it thus appears that the Act, in express terms, permits a violation of any of its provisions to be pleaded by a private person in a suit against him for the price of goods purchased of a corporation transacting business contrary to the statute, it must follow that the right to

pleaded by way of defence, would call for a separate and distinct determination of the legal status of the plaintiff, thereby making the claim for purchase money merely an incidental issue. This would be true even if the amount involved were but five dollars, and the case were before a justice of the peace. The result would depend upon the varying conditions of each case as affected by the skill of lawyers, the bias of jurors, and other attendant circumstances. This would inevitably lead to such confusion as would force federal courts to so construe the statutes as to protect the due and regular administration of justice from unconscionable prolixity and irreconcilable adjudications. In the case of *Ford v. Association*, 155

Ill. 166 (1895), (39 N. E. Rep. 651, 27 L. R. A. 298) the Supreme Court of Illinois permitted the defendant to interpose this defence in collateral proceedings. The point last above stated does not appear to have been considered by that court. The only contention was as to whether or not the statute of 1891 constituted a valid defence to that action. But the Illinois statute is silent as to the method to be pursued in determining whether a corporation seeking to enforce a claim comes within the prohibition of the act, nor has there been any long established usage in the premises."

¹ *National Lead Co. v. Grote Paint Store Co.*, 80 Mo. App. 264 (1899).

plead such a defence entitles the party so authorized by the legislature to prove what he has pleaded."

§ 419. **Criminal Proceedings.** — State anti-trust statutes create statutory offences and prescribe penalties to be imposed upon those who commit them.¹ Combinations in violation of their provisions are made criminal conspiracies. They are generally declared to be "conspiracies to defraud," or "conspiracies against trade." While, in exceptional instances, a penalty in the form of a forfeiture is prescribed, generally the penalty is a fine for offending corporations, and fine or imprisonment for individuals, including officers and agents of corporations.²

¹ *State v. Buckeye Pipe Line Co.*, 61 Ohio St. 545 (1900), (56 N. E. Rep. 464).

² The following penalties are prescribed in the latest anti-trust statutes of the several States for violating their provisions. For (references to statutes see note to § 405, ante):

Alabama. Fine of not less than \$500 nor more than \$2000 to be imposed upon any "person or corporation."

Arkansas. Forfeiture of not less than \$200 nor more than \$5000 for each offence — each day constituting a separate offence. Act applies to persons, partnerships, and corporations, their officers and agents.

Florida. Fine of not more than \$5000 or imprisonment for not more than one year or both. Applies to any person as principal, manager, director or agent.

Georgia. Fine of not less than \$100 nor more than \$5000, or imprisonment for not less than one, nor more than ten years or both. Applies to any person as principal, manager, director or agent engaging in, or knowingly carrying out, purposes of conspiracy.

Illinois. "Corporations, companies, firms and associations" punishable by fine of not less than \$500 nor more than \$2,000 for first offence. Additional penalties for subsequent offences. Offi-

cers, agents and individuals may be fined not less than \$200 nor more than \$1000 or imprisoned for not more than one year, or both.

Indiana. Fine of not less than \$100 nor more than \$5000, or imprisonment for not less than one nor more than ten years, or both. Applies to any person as principal, manager, director or agent engaging in, or knowingly carrying out, purposes of conspiracy.

Iowa. "Corporation, company, firm or association" may be fined not less than one nor more than twenty per cent of capital stock or money invested. Officers, agents or individuals are punishable by fine of not less than \$500 nor more than \$5000, or by imprisonment for not more than one year or both.

Kansas. Fine not less than \$100 nor more than \$1000 and imprisonment for not less than thirty days nor more than six months. Also forfeiture of \$100 for each day's violation. Applies to "all persons, companies and corporations, their officers, agents, representatives or consignees."

Kentucky. "Corporation, company, firm, partnership or person or association of persons" may be fined not less than \$500 nor more than \$5000.

Any officer, agent or any individual may be fined not less than \$500, nor more than \$5000, or imprisoned for not less than six nor more than twelve months or both.

Of the purpose of these statutes in prescribing penalties, to be imposed, not only upon corporations but upon their

Louisiana. Fine of not less than \$100, nor more than \$1000, or imprisonment for not less than six months, nor more than one year, or both. Applies to any person who, as "principal, manager, director or agent," engages in, or knowingly carries out purposes of, conspiracy.

Maine. "Any person, incorporated or unincorporated company, or association of persons or stockholders" entering into an unlawful combination, may be fined not less than \$5000, nor more than \$10,000.

Michigan. Fine of not less than \$50, nor more than \$5000, or imprisonment for not less than six months, nor more than one year, or both. Applies to any person engaging in or carrying out conspiracy as "principal, manager, director, agent, servant or employer, or in any other capacity." The penalties prescribed in the earlier Michigan statute are less severe.

Minnesota. Fine of not less than \$500 nor more than \$5000, or imprisonment for not less than three nor more than five years.

Mississippi. Fine of not less than \$100 nor more than \$5000, or imprisonment for not less than three nor more than twelve months, or both. Applies to any person as "principal, director, manager, agent, or in any other capacity," engaging in or knowingly carrying out purposes of conspiracy. The minimum fine under another statute is larger. See *American Fire Ins. Co. v. State*, 75 Miss. 24 (1897), (22 So. Rep. 99).

Missouri. "Any corporation or company, individual, firm or association violating any of the provisions of this act, shall forfeit not less than \$5 nor more than \$100 for each day it shall continue to do so."

Montana. "Every person, corporation, stock company or association of persons" violating act, is punishable by imprisonment for not exceeding

five years, or by fine not exceeding \$10,000, or both.

Nebraska. Any person or persons carrying on, creating or attempting to create a "trust," is guilty of a misdemeanor, punishable by fine of not less than \$25 nor more than \$5000.

New Mexico. Fine not exceeding \$1000 nor less than \$100, and imprisonment not exceeding one year, or until fine is paid. Applies to every person, whether individual, agent, officer or stockholder violating act.

New York. Fine not exceeding \$5000 or imprisonment for not longer than one year, or both. Applies to every person making contract or engaging in combination in violation of act.

North Carolina. Forfeiture of \$100 for each day of continued violation. Applies to corporations, associations and individuals.

North Dakota. Fine of not less than \$100 nor more than \$5,000, or imprisonment for not less than one nor more than ten years. Applies to any person engaging in or "as principal, manager, director or agent, or in any other capacity," carrying out purposes of conspiracy.

Ohio. Fine of not less than \$50 nor more than \$5,000, or imprisonment for not less than six months nor more than one year, or both. Applies to any person engaging in, or "as principal, manager, director, agent, servant or employer, or in any other capacity," carrying out purposes of conspiracy. Each day's violation constitutes a separate offence.

Oklahoma. Fine of not less than \$50 nor more than \$500. Applies to "any individual, firm, partnership or any association of persons."

South Carolina. Fine of not less than \$100 nor more than \$5,000, or imprisonment for not less than six months nor more than ten years, or both. Applies to any person engaging in, or as "principal, manager, director or agent, or in

officers and agents, the Supreme Court of Kentucky in *Commonwealth v. Grinstead*¹ said: "It seems manifest that the object of the statute was, in the first part, to impose punishment upon the corporate entities which might violate the statute, and this could be done only by a fine; and that the intention in the second part was to impose punishment upon the officers of such corporate entities or associations, and punish individuals who might be guilty of the same offence; and that in the case of natural persons, as it was possible to impose an additional penalty of imprisonment, it was imposed, in order the more effectively to deter them from committing, or permitting the corporations which they represent to commit, the offences denounced by the statute."

It is not necessary to constitute a conspiracy within the provisions of an anti-trust statute, in a common form, that the combination should actually have an effect upon competition or prices. Entering into a combination designed to affect competition or prices, constitutes a complete offence.² An indictment charging the offence of conspiracy in the language of the statute is, as a general rule, sufficient.³

any other capacity," knowingly carrying out purposes of conspiracy.

South Dakota. Fine of not less than \$1,000 nor more than \$5,000. Additional penalties for second offence. Applies to "any person or persons, officers or servants of any company, co-partnership or association of persons" violating provisions of act.

Tennessee. Fine of not less than \$100 nor more than \$5,000, or imprisonment for not less than one year nor more than ten years, or both. Applies to any person engaging in, or "as principal, manager, director or agent, or in any other capacity," knowingly carrying out purposes of conspiracy.

Texas. "Any person, partnership, firm or association, or any representative or agent thereof, or any corporation or company, or any officer, representative or agent thereof, violating any of the provisions of this act, shall forfeit not less than \$200 nor

more than \$5000 for every such offence." Each day of continued violation constitutes a separate offence.

Utah. Corporations, firms and associations may be fined not less than \$100 nor more than \$2000 for first offence. Additional penalties for subsequent offences. Officers, agents and individuals may be fined not less than \$100 nor more than \$1000, or imprisonment for not more than one year, or both.

¹ *Commonwealth v. Grinstead*, 21 Ky. L. Rep. 1444 (1900), (55 S. W. Rep. 720).

² *American Handle Co. v. Standard Handle Co.* (Tenn. 1900), (59 S. W. Rep. 709); *Commonwealth v. Grinstead*, 21 Ky. L. Rep. 1444 (1900), (55 S. W. Rep. 720).

³ *Commonwealth v. Grinstead*, 21 Ky. L. Rep. 1444 (1900), (55 S. W. Rep. 720). As to procedure under New York statute of 1899, for the pur-

§ 420. **Civil Remedies.** — In addition to the penalties provided in the statutes for the formation of combinations, — regarded as criminal offences, — the acts, as a general rule, prescribe other penalties, enforceable through the civil courts. These provisions usually take substantially the following forms:

(1) "Any corporation chartered under the laws of this State which shall violate any of the provisions of this act shall thereby forfeit its charter and franchise, and its corporate existence shall thereupon expire and terminate."¹

(2) "Every foreign corporation which shall violate any of the provisions of this act is hereby denied the right to do, and is prohibited from doing, business in this State."²

(3) "Any person or persons or corporations that may be injured or damaged by any such arrangement, contract, agreement, trust or combination, . . . may sue for and recover, in any court of competent jurisdiction in this State, of any person, persons or corporation operating such trust or combination, the full consideration or sum paid by him or them for any goods, wares, merchandise or articles, the sale of which is controlled by such combination or trust,"³

or

"Any person, firm, company or corporation that may be damaged by any such agreements, trusts or combinations described in . . . this act may sue for and recover in any court of competent jurisdiction in this State such damages as they have sustained, together with a reasonable attorney fee."⁴

pose of obtaining testimony before instituting proceedings, see *Matter of Davies*, 168 N. Y. 89 (1901).

¹ *Georgia*. Act of Dec. 23, 1896, § 2. Similar provisions appear in the anti-trust statutes of *Arkansas, Florida, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, North Dakota, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, and Wisconsin*. See statutes collected in note to § 405, *ante*.

² *Georgia*. Act of Dec. 23, 1896,

§ 2. Similar provisions appear in the anti-trust statutes of *Arkansas, Florida, Illinois, Indiana, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Tennessee and Texas*. See statutes collected in note to § 405, *ante*.

³ *Georgia*. Act of Dec. 23, 1896, § 5. Similar provisions appear in the anti-trust statutes of *Arkansas, Indiana, North Dakota, South Carolina and Tennessee* (Act of 1879). See statutes collected in note to § 405, *ante*.

⁴ *Kansas*. Act of March, 1897, § 8.

The penalties and forfeitures prescribed in these provisions are entirely independent of other penalties stated in the statutes. An antecedent conviction of a violation of a statute — as a criminal offence — is not necessary to enforce a civil liability. “Any court having jurisdiction to enforce any penalty or remedy provided for in the act, was, obviously, intended to have, and manifestly has, jurisdiction, also, to first adjudge the fact of violation, on which the enforcement must ultimately find its support and justification.”¹

Proceedings against domestic corporations to enforce the forfeiture of their charters must be by *quo warranto*. *Quo warranto* proceedings may also be instituted against foreign corporations to oust them from the State for violating these statutes,² or the attorney general may maintain a suit for an injunction to restrain them from further doing business.³

While the statutory provision that persons injured by a combination may recover the “full consideration or sum paid” manifestly prescribes a penalty, it has been said by the Supreme Court of Tennessee that the amount recoverable may also be designated as “damages.”⁴ The Court said: “It cannot be affirmed with any degree of certainty that the measure of recovery prescribed in the act is not in fact within the bounds of actual damages, for it is a matter

Similar provisions appear in the anti-trust statutes of *Nebraska*, *Oklahoma*, and *South Dakota*. In *Michigan*, *Mississippi*, *Ohio* and *Tennessee* (Act of 1891), double damages are recoverable, and in *Missouri* and *Utah*, treble damages. See statutes collected in note to § 405, *ante*.

¹ *State v. Schlitz Brewing Co.*, 104 Tenn. 715 (1900), (59 S. W. Rep. 1041).

² *State v. Firemen's Fund Ins. Co.*, 152 Mo. 1 (1899), (52 S. W. Rep. 595); *State v. Standard Oil Co.* (Neb. 1901), 84 N. W. Rep. 413. See also *Waters-Pierce Oil Co. v. State*, 19 Tex. Civ. App. 1 (1898), (44 S. W. Rep. 936). That foreign corporations may be ousted from the State for acts of their agents within the State, see *Waters-Pierce Oil Co. v. State*, 19 Tex. Civ. App. 1

(1898), (44 S. W. Rep. 936); *State v. Schlitz Brewing Co.*, 104 Tenn. 715 (1900), (59 S. W. Rep. 1041). As to liability, under anti-trust statutes, of agents of foreign corporations, see *State v. Phipps*, 50 Kan. 609 (1893), (31 Pac. Rep. 1097). Also *State v. Schlitz Brewing Co.*, *supra*.

³ *State v. Schlitz Brewing Co.*, 104 Tenn. 715 (1900), (59 S. W. Rep. 1041). See also *Hartford Ins. Co. v. Raymond*, 70 Mich. 485 (1888), (38 N. W. Rep. 474).

⁴ *State v. Schlitz Brewing Co.*, 104 Tenn. 715 (1900), (59 S. W. Rep. 1041). As to recovery of double damages under Tennessee statute of 1891, see *American Handle Co. v. Standard Handle Co.* (Tenn. 1900), 59 S. W. Rep. 709.

of common knowledge that men who, in their business, become the injured victims of trusts or combinations often suffer not only a depreciation in the salable value of their commodities then on hand, but also a complete destruction of their business for the future; the aggregate losses so sustained in many instances greatly exceed the prices they originally paid for the commodities in question."

§ 421. **Evidence.** — For reasons already considered in reference to illegal combinations generally, it is not necessary, in order to establish a violation of an anti-trust statute, to show, by direct evidence, that an unlawful combination has been formed.¹ The facts and circumstances attending the acts of the parties may clearly show their unlawful purpose and may constitute the best evidence. Illegal combinations are not, as a general rule, evidenced by written agreements stating a purpose forbidden by law.

In *State v. Firemen's Fund Ins. Co.*² the Supreme Court of Missouri said: "Of course there was no written agreement forming the trust, for that was 'inexpedient, and might make the members liable to prosecution under the trust laws,' as the president of the club well and wisely remarked when the club was formed. When people set out to do acts that are either *mala in se* or *mala prohibita*, they do not put up a sign over the door or a stamp on the act declaring their purposes and intent. Concealment is generally their prime object. But as such matters exist without agreements and rest upon common understanding and practice, so the proof of their existence may be of the same character; and while such laws are penal in their nature and should be strictly construed, . . . nevertheless a pool or trust may be as conclusively proved by facts and circumstances as by direct written evidence, for in this regard they are like all other frauds."

¹ *State v. Firemen's Fund Ins. Co.*, 152 Mo. 1 (1899), (52 S. W. Rep. 595); *Waters-Pierce Oil Co. v. State*, 19 Tex. Civ. App. 1 (1898), (44 S. W. Rep. 936). See also *American Handle Co. v. Standard Handle Co.* (Tenn. 1900), 59 S. W. Rep. 709. And see *ante*,

§ 375: "*Evidence*;" *ante*, § 401: "*Invalidity of Combination must be shown. Evidence.*"

² *State v. Firemen's Fund Ins. Co.*, 152 Mo. 40 (1899), (52 S. W. Rep. 595), (*per Marshall, J.*).

§ 422. **Statutes of Limitation.** — Upon the principle that every overt act is a renewal of the original conspiracy, a prosecution for a violation of a State anti-trust statute making combinations criminal conspiracies may be maintained against a continuing combination, although the statutory period has elapsed between the formation of the combination and the finding of the indictment.¹

§ 423. **Conclusion.** — The foregoing examination of State anti-trust statutes clearly demonstrates that many statutes are unconstitutional and many wholly inadequate. Effective legislation can be the result only of radical changes.

The statement often made at the present time, however, that statutes cannot afford effective relief from the evils of the modern combination, because they interfere with the working of economic principles, is only half true. It may be that "the laws of trade are stronger than the laws of man." But when the laws of trade require for their operation the laws of man, a comparison is impossible.

It may be that the law cannot prevent men from co-operating in business. But when a corporate combination is formed, the *aid* of the law is necessary to make the combination effective. There is a distinction between sufferance and participation — between permitting co-operation and creating a combination. So far as the evils of a corporate combination result from its corporate character — and many evils so result — they are the direct consequence of legislative action.

The evils resulting from legislation may be remedied by legislation. The State granting a charter to a corporate combination may, as a general rule, take it away. Other States may decline to admit it or may expel it. They may forbid foreign corporations holding shares in domestic companies or owning other property within the State.

Public sentiment, undoubtedly, does not demand any such radical legislation. It is idle, however, to say that the State cannot provide some relief from the evils of the corporate combination when relief is demanded.

¹ *American Fire Ins. Co. v. State*, 75 Miss. 24 (1897), (22 So. Rep. 99).

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